(1)

NO. 90-1348

Supreme Court, U.S.
FILED
JAN 15 1991
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

BRIAN L. SMITH,

Petitioner

versus

TOWN OF EATON, INDIANA,
TOWN BOARD OF EATON & ITS MEMBERS,
RONALD HAGGARD, as board member and individually, DAVID WILLIAMS, as board member and individually, ANDY CAVANAUGH, as board member and individually, CHARLES HICKS, as board member and individually, DON MITCHELL, as board member and individually, JIMMIE VANCE, as Town Marshall and individually, and Does 1 thru 5.

Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the Seventh Circuit Court of Appeals clearly erred in its finding of fact that the Petitioner had meaningful notice of the pre-deprivation hearing when:

a. the District Court's finding of facts do not mention notice;

b. the Court of Appeals relies on the garbled ramblings of the Petitioners brief, which were nearly so incomprehensible as to warrant the outright dismissal of the appeal; and

c. even though the exhibits clearly and conclusively show that the Petitioner could not possibly have been given more than twelve hours notice of the pre-deprivation hearing.

2. Whether a statute which requires no hearing before a tenured police officer with a statutory property and liberty interest in his job is suspended for 10 days violates the due process clause of the United States Constitution.

3. Whether twelve hours notice of a meeting to terminate a tenured policeman's employment satisfied the

Constitutional requirement of a meaningful pre-deprivation hearing?

LIST OF PARTIES

The following individuals and entities were parties to the proceedings in the Court of Appeals for the Seventh Circuit:

NO. 90-2563

Plaintiff-Appellant: BRIAN L. SMITH

Defendants-Appellees:

TOWN OF EATON, INDIANA, TOWN BOARD OF EATON & ITS MEMBERS, RONALD HAGGARD, as board member and individually, DAVID WILLIAMS, as board member and individually, ANDY CAVANAUGH, as board member and individually, CHARLES HICKS, as board member and individually, DON MITCHELL, as board member and individually, JIMMIE VANCE, as Town Marshall and individually, and Does 1 thru 5.

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The Petitioners respectfully petition this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in Smith v. Town Board of Eaton, et.al., No. 89-256 and as published at 910 F.2d 1469.

On August 21, 1990, the Seventh Circuit Court of Appeals affirmed the decision of the United States District Court for the Southern District of Indiana, granting summary judgment on behalf of the Respondents and denying the Petitioner's Motion for Summary Judgment based upon the suspension and eventual termination of the Petitioner as a police officer employed by the Respondents.

OPINIONS BELOW

The unpublished opinion of the

District Court issued on July 21, 1989, and can be found in the Appendix beginning at page A-10. The District Court for the Southern District of Indiana granted summary judgment in favor of the Respondents and denied the Petitioner's summary judgment motion.

The Seventh Circuit Court of Appeals held oral arguments in this matter on June 12, 1990. On August 21, 1990, the Court of Appeals affirmed the decision of the District Court in an opinion published at 910 F.2d 1469. A copy of that opinion has been included in the Appendix at page A-1.

JURISDICTION

The judgment of the Seventh Circuit Court of Appeals was entered on August 21, 1990. The Petitioner then filed a timely Petition for Rehearing on

September 4, 1990. The Court of Appeals denied the Petition for Rehearing on October 17, 1990.

This Court has jurisdiction to review the judgment under the authority of 28. U.S.C. § 1254. This petition is timely filed in that it is filed before the expiration of the ninety (90) day period allowed by Rule 13.

Jurisdiction in the Federal District Court was obtained under 28 U.S.C. § 1332 when the Petitioner filed a Complaint pursuant to 42 U.S.C. § 1983.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED,

The initial statute involved in this case governs the procedure for disciplining and terminating police officers in the State of Indiana IND.

CODE § 36-8-3-4 (Wests, 1985). It provides in pertinent part:

> **Disciplinary powers of safety boards in cities, towns and townships.**--(a) This section also applies to all towns and townships that have full-time, paid police or fire departments. For purposes of this section, the appropriate appointing authority of a town or township is considered the safety board of a town or township.
>
> * * *
>
> (b)Except as provided in subsection (m), a member of the police or fire department holds office or grade until he is dismissed or demoted by the safety board. A member may be disciplined by demotion, dismissal, reprimand, forfeiture, or suspension upon either:
>
> * * *
>
> (2) A finding and decision of the safety board that the member has been or is guilty of any one [1] or more of the following:
>
> (A) Neglect of duty.
>
> (B) A violation of rules.
>
> (C) Neglect or disobedience of orders.
>
> (E) Immoral conduct.
>
> (G) Conduct injurious to the public peace or welfare.
>
> (H) Conduct unbecoming an officer.

> (I) Another breach of discipline.
>
> * * *
>
> (c) Before a member of a police or fire department may be suspended in excess of ten [10] days, [now five (5) days as amended in 1989] demoted, or dismissed, the safety board shall offer the member an opportunity for a hearing, if demanded. Written notice shall be given either by service upon the member in person or by a copy left at his last and usual place of residence. The notice must state:
>
> (1) The time and place of the hearing;
>
> (2) The charges against the member;
>
> (3) The specific conduct that comprises the charges;
>
> (4) That the member is entitled to be represented by counsel;
>
> (5) That the member is entitled to call and cross-examine witnesses;
>
> (6) That the member is entitled to have subpoenas issued, served, and executed in the county where the unit is located[.]
>
> * * *
>
> (e) The reasons for the suspension, demotion, or dismissal of a member of the police or fire department shall be entered as specific findings of fact upon the

records of the safety board. A member who is suspended for a period exceeding ten [10] days, [now five] demoted, or dismissed may appeal the decision to the circuit or superior court of the county in which the unit is located. However, a member may not appeal any other decision.

(f) An appeal under subsection (e) must be taken by filing in court, within thirty [30] days after the date the decision is rendered, a verified complaint stating in concise manner the general nature of the charges against the member, the decision of the safety board, and a demand for the relief asserted by him.

* * *

(h) A decision of the safety board is considered prima facie correct, and the burden of proof is on the party appealing. All appeals shall be tried by the court. The appeal shall be heard de novo only upon any new issues related to the charges upon which the decision of the safety board was made. The charges are considered to be denied by the accused person.

The Petitioner also alleges that the Respondents failed to follow the above-cited statutory provisions

requiring pre-deprivation notice of the date and time of the hearing, and notice of the charges against. Because the above statute confers upon a police officer a property and liberty interest in retaining his employment, the outlined procedures implicate the due process clause of the Fourteenth Amendment to the United States Constitution which operates to protect this interest from deprivation without due process. The Fourteenth Amendment provides as follows in relevant part:

> . . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law[.]

Thus, 42 U.S.C. § 1983 is applicable because the Petitioner alleged in his Complaint that the Respondents deprived him of liberty and property without due process of law. The Civil Rights statute, 42 U.S.C. §

1983, states in pertinent part as follows:

> **Civil action for deprivation of rights**
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, to any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Proceedings Below

It is essential to this Petition for Certiorari that the proceedings at the District Court and Appellate levels be explained in order to expose the glaring defects in the findings of fact of the District Court and those of the

Court of Appeals.

This litigation was commenced with the filing of an action pursuant to 42 U.S.C. § 1983. The Petitioner, Mr. Smith, alleged that the Respondents suspended him from work without pay for two ten-day periods, made him work without pay for two months' worth of weekends, and ultimately discharged him on May 5, 1988. The Petitioner did not seek judicial review of the suspensions, the order to work without pay, or of his dismissal. Instead, the Petitioner filed this action upon being terminated.

Both the Petitioner and the Respondents filed motions for summary judgment. The District Court had before it affidavits submitted by several individuals on behalf of the Petitioner, responses to the Petitioner's Interrogatories and Request for

Production, and minutes of meetings held by the Respondents, the Board of Trustees for the Town of Eaton, Indiana.

The Petitioner argued that the Respondents failed to give him notice before any hearing, except the December 29, 1987 hearing. Also, the Petitioner argued that the hearings were not "meaningful" because of the failure to provide prior notice and the denial of a substantial opportunity to respond to charges against him, which were contrary to this Court's opinion in Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).

The Respondents offered no evidence of oral or written notice of the hearings on December 12, 1987 which resulted in the order requiring the Petitioner to work without pay on his days off, on the February 13, 1988

hearing which resulted in the decision to suspend the Petitioner for ten days, or on the hearing on May 5, 1988 which ultimately ended in the Petitioner's termination. Instead, the Respondents argued that Parratt v. Taylor, 451 U.S. 527 (1981), controlled, and that any inquiry into pre-deprivation notice and meaningful hearing was irrelevant given the availability of a statutory post-deprivation remedy in the form of judicial review of the administrative decision.

The District Court agreed with the Respondents and found Parratt controlling. Herein lies the crux of the dilemma.

Consistent with this Court's rationale in Parratt, the District Court made no findings of facts and

conclusions of law which did not even speak of notice except for the December 29, 1987 hearing.

Actually, the District Court merely signed the Respondents' proposed finding of facts and conclusions of law. The findings of fact are reproduced in their entirety in the Appendix at page A-10.

On appeal, the Court of Appeals found that Loudermill, not Parratt, controlled the Court's analysis of the issues. After noting that this Court's decision in Loudermill held that due process mandates a meaningful pre-deprivation hearing where practicable, the Court of Appeals held that the District Court's findings of facts were insufficient to dispose of the issues presented on appeal. Thus, the Court of Appeals was forced to scour the arguments of counsel and the record

for evidence of notice. The United States Court of Appeals was faced with a "particularly difficult situation." Appendix p. A-3, 910 F.2d 1469, 1471.

Unfortunately for the Petitioner and the Court of Appeals, the briefs filed by Petitioner's Appellate counsel were ". . . rambling, almost totally incomprehensible in its treating of the issues and legal principles." Appendix, page A-2, 910 F.2d 1469, 1470. The Court of Appeals further stated "[t]he treatment of the factual background of the case is similarly lacking." Id. The Court of Appeals then defined the brief as "... a shallow, incoherent 'argument' that spans twenty-five pages." Id.

The Court of Appeals specifically held that the District Court found that the Petitioner had notice of the December 29th hearing, which resulted in

the January ten-day suspension. Appendix, p. A-5, 910 F2d at 1472. The District Court took the effort to overtly and specifically find that such notice occurred, stating:

> 3. That sometime in December of 1987 the plaintiff received notification by the Town Marshal of Eaton of a ten (10) day suspension hearing to be held on December 29, 1987. Said hearing was conducted by the Town Board of Eaton, whereby the plaintiff was suspended for conduct unbecoming an officer for the ten (10) day period January 15, 1988, to January 29, 1988, pursuant to Ind. Code § 36-8-3-4(b) and (c).

On the contrary, the District Court made so such specific findings with respect to notice of other hearings. The finding of fact regarding the May 5 termination stated:

> 7. On May 5, 1988, in a special session of the Town Board of Eaton, the plaintiff was dismissed from his duties as a full-time police officer for the Town of Eaton for conduct unbecoming an officer, pursuant to Ind. Code § 34-8-3-4.

It is a mystery how the Court of Appeals could have made the blanket statement that "[t]he District Court found that Mr. Smith [the Petitioner] received notice and a hearing prior to . . . his dismissal in May." It is a clearly erroneous, unsupported finding of a material, essential fact whether there was adequate pre-deprivation notice.

In its decision the Court of Appeals found that Mr. Smith received notice prior to the February suspension, The Court of Appeals even noted that the District Court made no specific finding of fact regarding whether the Respondents gave the Petitioner notice of the February hearing. However, the Court of Appeals' finding as to the May

5 notice and as to the February notice are equally unsupported by anything in the District Court's findings, or by anything in the record. Despite this lack of factual support, the Court of Appeals found that the Loudermill pre-deprivation due process requirement was met, and that the Petitioner received adequate notice and meaningful disciplinary hearings. The United States Court of Appeals for the Seventh Circuit then affirmed the District Court's entry of summary judgment in favor of the Respondents and denied the Petitioner's cross-motion for summary judgment. Appendix, p. A-1.

STATEMENT OF THE FACTS

The Petitioner, Brian L. Smith, was employed as a police officer by the Town

of Eaton Police Department from June 1986 until he was dismissed by the Town of Eaton Board of Trustees (the Respondents) on May 5, 1988. Indiana Law granted Mr. Smith a property interest in his continued employment because the statutes stated that he could be dismissed only for just cause. IND. CODE § 36-8-3-4.

On December 18, 1987 the Petitioner received a letter from the town Marshal, Jimmie Vance, stating that several members of the Eaton Town Board had met and decided that the Petitioner was guilty of conduct unbecoming an officer. The marshal also stated that as a result, the Petitioner was required to forfeit all of his days off during January and February of 1988. Apparently this action forced the Petitioner to work several shifts

without pay on his scheduled days off work. Appendix, p. A-28.

Sometime in December of 1987 Mr. Smith received notice of a suspension hearing to be held during an executive session on December 29, 1987. Mr. Smith attended the hearing. The Respondents provided written statement of the charges to Mr. Smith before the executive session. During the executive session, the Town Board voted to suspend Mr. Smith for 10 days in January without pay.

Three months before the Respondents dismissed the Petitioner, David Williams, a member of the Town of Eaton Board of Trustees as well as the Police Commissioner of Eaton, asked Mr. David L. Withers if he would be interested in working for the Eaton Police

Department. Appendix, p. A-34. When Mr. Withers asked who was leaving the Eaton Police Department, David Williams replied that the Board was "going to get rid of Brian Smith." Id. Mr. Withers also stated that Williams had just consulted with other members of the Town Board and the town Marshal immediately before offering the job to Mr. Withers. Id.

On February 13, 1988 the Respondents met in a "special session," ostensibly to discuss town nuisance ordinances. During this special session, the Board also discussed suspending Mr. Smith. One board member, John Penrod, refused to vote, stating that Mr. Smith should be called in for a hearing before he was suspended. Despite this protest, the Respondents voted to suspend Mr. Smith for 10 days

without pay beginning February 19, 1988 stating that "[t]his is to be a final step prior to dismissal." Mr. Smith was informed of the suspension by an undated letter received after the action was taken against him in his absence. Mr. Smith was not at that special session.

During a regular meeting of the Town Board of Trustees on February 24, 1988, the Board voted to retroactively suspend Mr. Smith effective February 18, 1988. Again, Board member John Penrod abstained from voting. The Board noted that the February 13, 1988 hearing had been held for a special purpose involving the planning commission. The minutes reveal no mention that Mr. Smith was notified of either the action taken against him at the February 13 special session or the retroactive suspension

hearing or any discussion or hearing on the charges against Mr. Smith. In fact, one of the board members stated that "according to State Law a suspension up to and including ten days can be given without a hearing with the officer." Mr. Smith was not present at the February 24, 1988 regular session.

On May 2, 1988 Phyllis Cantor, a recent contributor to the Police Discretionary Fund, lodged a complaint against Mr. Smith with the Town of Eaton. At a special session of the Town of Eaton Board of Trustees on the evening of May 4, 1988, the board held a closed-door "executive session" to "discuss" the Cantor complaint. No report of the substance of the "executive session" was contained in the minutes of the Special Session of May 4.

Immediately following this evening

Special Session of May 4, 1988, the board members concurred in calling for an "Emergency Special Session" for 8:00 A.M. May 5, 1988. Appendix, p. A-27. That evening, the town board called and placed notice of the Emergency Special Session in the newspapers. Id.

The minutes of the May 5, 1988 Emergency Special Session show that Brian Smith was present. Appendix, A-31. There is no record that Mr. Smith received notice of the May 5, 1988 morning Emergency Special Hearing, or notice of the charges against him which ultimately resulted in his dismissal from employment. At the Emergency Special Meeting, the Board "discussed" the complaint by Cantor. The Board then voted to dismiss Mr. Smith and ordered him to turn in his police badge and weapon.

On May 10, 1988 at another Town Board Special Session, the Board made the following statements in response to questions by another Eaton Police officer who was concerned about civil rights and whether Mr. Smith knew the reasons why he was terminated:

> he has a right within thirty (30) days . . . he has thirty (30) days if he wishes for a hearing to file to let us know he wants that and in thirty (30) he'll have that hearing and he wishes that we're obligated to . . . its one of his rights, that's what he likes [David Williams, Town Board Member]

1. Whether the Seventh Circuit Court of Appeals clearly erred in its finding of fact that the Petitioner had meaningful notice of the pre-deprivation hearing.

Only finding of fact number three [3] even mentions prehearing notification only of the time and date of a hearing. Appendix, p. A-13.

Conversely, findings of fact numbers five and seven speak of the Respondents holding hearings on disciplinary charges against the Petitioner, and of the Respondents taking adverse action against the Petitioner. Appendix, p. 14-15. However, the District Court failed to find that the Respondents gave the Petitioner any pre-deprivation notice, either orally or written, as required by Indiana statute. IND. CODE § 36-8-3-4.

Finding of fact number 4 does not even hint that a hearing was held before the Petitioner was ordered to work all his days off during January and

February, 1988 without pay.

In order for this Court to examine the findings of fact made by a Court of Appeals, there must be an "obvious and exceptional" showing of error. Graven Manufacturing Co. v. Linde, 336 U.S. 271, 275 (1949); United States v. Doe, 465 U.S. 605 (1984); Goodman v. Lukens Steel Co., 482 U.S. 656, 665 (1987). Normally, as in the three cases cited above, most judgments represent concurrent findings of fact by two courts. Thus, this Court rightful is hesitant to examine even errors that are obvious in the record.

In this case the District Court made quite limited findings of fact geared solely toward its mistaken application of Parratt v. Taylor, supra, to the case at hand. Therefore, the Court of Appeals was forced to make

findings of "notice" of the pre-deprivation hearings (both suspension and termination hearings) in order to resolve the case. Appendix, p. A-5.

The Court of Appeals stated that "[t]he District Court found that Mr. Smith received notice and a hearing prior to his ten day suspension in January and his dismissal in May." Appendix, p. A-5. In reviewing finding of fact number 7 which concerns the January suspension (December 29, 1987 hearing) the District Court specifically found that notice was given.

No mention of notice or hearing regarding the December 12, 1987 order forcing Mr. Smith to work without pay appears in either the District Court's findings of fact or the Court of Appeals opinion. Somehow the question of the

legality of this forfeiture was totally forgotten and left unresolved.

The decision of the Court of Appeals is clearly erroneous when the facts and the record are organized and displayed for the court in a logical, coherent fashion. Unfortunately, the Petitioner, Mr. Smith, did not receive the benefit of such a brief at the appellate level. Neither the Petitioner's nor the Respondents' briefs pointed out the undisputed fact that the Respondents set the May 5, 1988 termination hearing the night before, only twelve hours before Mr. Smith's termination hearing. Appendix, p. A-27. Thus there is no possible way that the Petitioner could have been given more than 12 hours Notice, and most of the hours were not working hours.

The impact of this clear error is dispositive of this case. Moreover, the Court of Appeals' published decision then stands for the proposition that 12 hours notice is sufficient under Loudermill. Other Courts of Appeals have also held that less than 12 hours notice prior to a pre-deprivation hearing is constitutionally acceptable under Loudermill. Kelly v. Smith, 746 F.2d 1412 (11th Cir. 1985); Brasslett v. Cota, 761 F.2d 827 (1st Cir. 1985); Parozo v. Rhoads, 711 F. Supp. 941 (N.D. Ill 1989).

In direct conflict with these decisions is Fetner v. City of Roanoke, 813 F.2d 1183 (11th Cir. 1987). In Fetner the Court of Appeals held that a phone call giving 30 minutes notice of a termination hearing is insufficient. Id. at 1184. Thus, there is a dispute

among the circuits as to the requirements of Loudermill, which is the subject of the second issue, below.

2. Whether a statute which requires no hearing before a tenured police officer with a statutory property and liberty interest in his job is suspended for 10 days violates the due process clause of the United States Constitution.

3. Whether twelve hours notice of a meeting to terminate a tenured policeman's employment satisfied the Constitutional requirement of a meaningful pre-deprivation hearing?

The Court of Appeals stated that because the Petitioner had "notice" of the hearing, was present at two of the

hearings and was not prevented from speaking, the Respondents satisfied the requirement of providing a meaningful pre-deprivation hearing. Appendix, p. A-6. Also, as shown above by indisputable fact, the Petition could only have had 12 hours notice of the May 5, 1988 termination hearing.

In Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), this Court stated the rule that due process mandates that a meaningful hearing must be held before a person is deprived of the substantive rights of life, liberty or property. Loudermill, at 541. The Court expressly states "[a]n essential principle of due process is that a deprivation of life, liberty or property be preceded by notice and opportunity for hearing appropriate to the nature of the case." Id. at 542

(emphasis added), citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 316 (1950). This Court further reemphasized that the hearing must occur before the deprivation. Id.

As the Court of Appeals correctly stated, there is no question that the Petitioner possessed a property interest in his job with the Eaton Police Department, due to the statutory requirement that he could only be fired for just cause. Appendix, p. A-4. Therefore, his termination was a deprivation of property. Hewitt v. Helms, 459 U.S. 460 (1983) (property interest defined by mandatory language in state statute which limits official discretion).

In addition, the Court of Appeals failed to inquire about or rule on the

deprivation of Petitioner's "liberty interest" as encompassed by his employment. As this Court also pointed out in Loudermill, a fired worker such as the Petitioner may encounter difficulties in finding new employment due to the burden of the questionable circumstances under which he left his previous job. Loudermill, 470 U.S. 532, 543. A worker is also deprived of his liberty when his good name, reputation, honor or integrity is at stake because of what government officials are doing to him. Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972). Suspensions, lay-offs, and other discipline can even result in a deprivation of a worker's liberty interests. Mims v. Board of Education, 523 F.2d 711 (7th Cir. 1975),

Davis v. Barr, 373 F. Supp. 740 (E.D. Tenn. 1973), Ruhlman v. Barger, 435 F. Supp. 447 (W.D. Pa. 1976), Bagby v. Beal, 439 F. Supp. 1257 (M.D. Pa. 1977).

The clear policy behind the Constitutional requirement of pre-deprivation notice is to reduce the possibility of an erroneous termination Loudermill, 470 U.S. 532, 543; Mathews v. Eldridge, 424 U.S. 319, 355 (1976); see also Goldberg v. Kelly, 397 U.S. 254, 267 (1970) (right to pre-deprivation hearing concerning welfare benefits). This reason underlying this policy is borne out by this case.

In the case at hand, at the only meaningful pre-deprivation hearing - the one held on December 29, 1990 - the Petitioner was able to expose as false one of the two complaints against him.

As a result, The Respondents only suspended the Petitioner for the one violation that he openly admitted. The Petitioner had at least ten days notice of the December 29, 1987 hearing. The same notice was completely absent with respect to the other hearing.

At no point did the Court of Appeals address the type of notice, the content of the notice, the number of days the notice was given to the Petitioner prior to each hearing, or the substance of each hearing. Appendix, p. A-6. Again, in reference to the quality of the Petitioner's appellant brief, Mr. Smith concludes that he was "not able to defend himself" at any of the hearings. The Court of Appeals, by its decision, clearly gave no weight to the obvious implications of the Petitioner's assertions that he was

denied a meaningful hearing in each of three instances.

CONCLUSION

For the above reasons, the writ of certiorari should be granted.

Respectfully submitted,

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Brian L. Smith

January 14, 1990

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 89-2563

BRIAN L. SMITH,

Plaintiff-Appellant,

v.

TOWN OF EATON, INDIANA, TOWN BOARD OF EATON AND ITS MEMBERS, RONALD HAGGARD, as board member and individually, GALE PITMAN, as board member and individually, DAVID WILLIAMS, as board member and individually, ANDY CAVANAUGH, as board member and individually, CHARLES HICKS, as board member and individually, DON MITCHELL, as board member and individually, JIMMIE VANCE, as Town Marshall and individually, and DOES 1 thru 5,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. 88 C 531—**Sarah E. Barker**, *Judge.*

ARGUED JUNE 11, 1990—DECIDED AUGUST 21, 1990

Before CUDAHY, FLAUM, and RIPPLE, *Circuit Judges.*

RIPPLE, *Circuit Judge.* Brian Smith filed a complaint under 42 U.S.C. § 1983 on May 6, 1988, the day following his termination as a police officer for the Town of Eaton. Mr. Smith's complaint asserted that his dismissal

violated his constitutional right to procedural due process, substantive due process, and equal protection. The district court granted the defendants' motion for summary judgment, and Mr. Smith appealed. For the following reasons, we affirm the judgment of the district court.

I

We must begin with an observation fortunately not necessary in too many cases that come before us. The appellant's brief is rambling, almost totally incomprehensible in its treatment of the issues and legal principles. The treatment of the factual background of the case is similarly lacking. It is well established that it is the duty of attorneys preparing cases for this court to examine carefully the law and apply it in a cogent fashion to the facts of the case. Under Rule 28(a)(4) of the Federal Rules of Appellate Procedure, counsel is required to present a brief that contains "the contentions of the appellant with respect to the issues presented, and the reasons therefor." We have noted that this rule requires counsel to present its arguments in a professional manner. *John v. Barron*, 897 F.2d 1387, 1393-94 (7th Cir. 1990). Unprofessional presentation of arguments not only is a disservice to this court, but also "is a disservice to other litigants," who must wait while this court is forced to undertake the extra duty of formulating counsel's arguments. *Bonds v. Coca-Cola Co.*, 806 F.2d 1324, 1328 (7th Cir. 1986). Especially now, when the court system is burdened to capacity, and when judicial resources are stretched to the very limit, our fiduciary duty to the institution we serve and to *all* the litigants who come before us requires that we be vigilant in enforcing the bar's responsibility to present issues clearly and comprehensively.[1]

[1] The duty that the bar owes to this court is mirrored by counsel's duty to represent clients competently. As stated by Rule 1.1 of the ABA Model Rules of Professional Conduct: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

This case presents a somewhat different problem from the cases in which we usually invoke Rule 28. Most of our cases have involved instances where counsel's submission is far too abbreviated and sketchy.[2] In those cases, we have stated repeatedly that this court cannot be called upon to supply the legal research and organization to flesh out a party's arguments. *See John*, 897 F.2d at 1393; *Zelazny v. Lyng*, 853 F.2d 540, 542 n.1 (7th Cir. 1988); *Beard v. Whitley County REMC*, 840 F.2d 405, 408-09 (7th Cir. 1988); *Bonds*, 806 F.2d at 1328; *Sanchez v. Miller*, 792 F.2d 694, 703 (7th Cir. 1986), *cert. denied*, 479 U.S. 1056 (1987). We see no functional difference between a brief containing a mere passing reference to a legal argument and one with a shallow, incoherent "argument" that spans twenty-five pages, the situation presented here. In both instances, the court is frustrated in performing its function of review and evaluation of the judgment before it.

Indeed, when the entire brief exhibits lack of attention, we are confronted with a particularly difficult situation. We recently have made it clear that we shall not hesitate to dismiss an appeal due to poorly prepared and researched briefs. *See John*, 897 F.2d at 1393 ("[W]e warned that one day the penalty for a perfunctory appeal could be dismissal of the appeal. That day has arrived.") (citation omitted); *cf. Spartacus, Inc. v. Borough of McKees Rocks*, 694 F.2d 947, 950 (3rd Cir. 1982) (Garth, J., dissenting) (dismissal of appeal appropriate when party does

[2] *See Bonds v. Coca-Cola Co.*, 806 F.2d 1324, 1328 (7th Cir. 1986) ("collateral allusions to a legal issue do not require the court to decide difficult questions"); *cf. United States v. White*, 879 F.2d 1509, 1513 (7th Cir. 1989) (argument raised in passing in a footnote deemed waived), *cert. denied*, 110 S. Ct. 1471 (1990); *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290, 291 n.1 (7th Cir.) (issue is waived due to party's failure to present substantive argument), *cert. denied*, 109 S. Ct. 308 (1988).

not present a court with complete brief).[3] This case comes close—very close—to meriting that sanction. However, because we can glean—albeit faintly—the basic facts and the general lines of argument from the briefs and record, we shall deal, as best we can under the circumstances, with what appear to be the basic contentions of the appellant.

II

Brian Smith had been employed as a police officer for the Town of Eaton since 1986. Beginning apparently in late 1987, Mr. Smith engaged in several activities that drew the attention of his supervisors and ultimately resulted in two suspensions of ten days each to be carried out in January and February, 1988. On May 5, 1988, the Town Board of Eaton met to investigate additional complaints against Mr. Smith. At that meeting the Board voted to dismiss Mr. Smith for conduct unbecoming a police officer, pursuant to Indiana Code § 36-8-3-4.

III

Mr. Smith alleges three constitutional violations to support his section 1983 claim. First, he argues that he was denied procedural due process. A due process claim (procedural or substantive) must be based on a violation of a protected liberty or property interest. *Bishop v. Wood*, 426 U.S. 341, 343 (1976). On the record before us, we see no reason to question that Mr. Smith had a property interest in his employment that was implicated by the ten

[3] Other federal appellate courts have recognized that dismissal as a sanction for poorly presenting a case on appeal is a necessary and salutary measure. *See* Annotation, *Sanctions, in Federal Circuit Courts of Appeals, for Failure to Comply with Rules Relating to Contents of Briefs and Appendixes*, 55 A.L.R. Fed. 521, 526-27 (1981) (collecting cases).

day suspensions and his ultimate dismissal.[4] However, his claim cannot succeed if the procedures he received were constitutionally adequate. The Supreme Court has established that an employee possessing a property interest in his job must be given notice and an opportunity to be heard prior to discipline. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547 (1985) (dismissal); *see also Garraghty v. Jordan*, 830 F.2d 1295, 1299-1300 (4th Cir. 1987) (applying *Loudermill* to five day suspension); *Pesce v. J. Sterling Morton High School*, 830 F.2d 789, 793 (7th Cir. 1987) (same); *cf. Goss v. Lopez*, 419 U.S. 565, 581 (1975) (requiring notice and opportunity to be heard before student may be suspended). The Supreme Court has made clear that this procedure need not be elaborate and can be satisfied with less than a full evidentiary hearing. *Loudermill*, 470 U.S. at 545.

The district court found that Mr. Smith received notice and a hearing prior to his ten day suspension in January and his dismissal in May. Mr. Smith has presented no argument that would allow us to call this determination

[4] Indiana Code § 36-8-3-4(b) permits suspension or dismissal of a police officer, but only upon the occurrence of several enumerated reasons. This court has interpreted a predecessor statute of section 36-8-3-4 to provide a property interest. *Parrett v. City of Connersville, Ind.*, 737 F.2d 690, 694 (7th Cir. 1984) (in the context of a dismissal), *cert. dismissed*, 469 U.S. 1145 (1985). An Indiana court came to the opposite conclusion when it interpreted the predecessor statute. *Dunlap v. Cross*, 403 N.E.2d 885, 887-88 (Ind. Ct. App. 1980). It appears that the *Dunlap* court placed great emphasis on the lack of appellate recourse in the statute for a suspension of less than 10 days. But as the Supreme Court has made clear, state procedures do not in themselves decide the question of whether a property interest has been created. *Olim v. Wakinekona*, 461 U.S. 238, 250-51 (1983); *Hewitt v. Helms*, 459 U.S. 460, 471 (1983). Because we treat Mr. Smith's suspensions, no matter what their length, as constituting the deprivation of a property interest, we need not concern ourselves with counsel's convoluted and at times incomprehensible time computations.

clearly erroneous.[5] The district court did not make a specific finding that Mr. Smith received notice before his ten day suspension in February, but Mr. Smith admits in his brief that he received notice. Appellant's Br. at 7. We conclude, therefore, that Mr. Smith received adequate procedure to satisfy the constitutional requirements of notice and an opportunity to be heard.

Mr. Smith's other two constitutional arguments border on the frivolous and will be discussed only briefly. Mr. Smith asserts that the actions by the Town Board of Eaton violated his substantive due process rights. The board's actions of suspending and ultimately dismissing Mr. Smith are based on several problems related to Mr. Smith's work, including an altercation with another officer, failure to follow procedure, and a written complaint by a citizen regarding Mr. Smith's performance of his duties. R.18 Ex. 4; R.20 Exs. A & D; R.21 at 4. In the face of these incidents, Mr. Smith presents no argument nor alleges any facts that would support a finding that the board's action was arbitrary or capricious. We conclude, therefore, that Mr. Smith's substantive due process claim has no merit.

Mr. Smith's equal protection argument similarly is meritless. He claims that the town board had information regarding complaints against two other officers and did not suspend or dismiss them. Appellant's Br. at 15. An equal protection claim must be based on "intentional discrimination against [the plaintiff] because of his membership in a particular class, not merely [because] he was treated unfairly as an individual." *Huebschen v. Department of Health and Social Servs.*, 716 F.2d 1167, 1171 (7th Cir. 1983); *see also Gray v. Lacke*, 885 F.2d 399, 414 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1476 (1990). Mr. Smith does not allege such class-based discrimination, and therefore this claim also fails.

[5] In conclusory fashion, Mr. Smith asserted in his brief to this court that he was "not able to defend himself prior to any of the numerous disciplinary actions and ultimately his termination." Appellant's Br. at 16. The minutes from the town board's May 5 executive session in which Mr. Smith was formally discharged indicate that Mr. Smith was present. R.18 Ex. 4. In addition, Mr. Smith admits in an affidavit that he was present at the executive session on December 29, 1987 at which his first 10 day suspension was discussed, R.21 at 5, and the minutes of that meeting indicate that Mr. Smith participated by asking questions. R.21 Ex. 1. While mere presence is not enough to satisfy the requirement that an employee be given an opportunity to be heard prior to an action that infringes a property interest, Mr. Smith never has contended that he was prevented from speaking at the meetings.

IV

Having disposed of the substantive issues before us, we now turn to the matter of sanctions. We must conclude that appellant's counsel's performance in this appeal has been substandard. We have been impeded in our review of the case and valuable time has been lost. We first admonish counsel that such performance is not to be repeated. Any such repetition may well result in suspension from practice before this court. Second, we fine counsel five hundred dollars ($500), payable within thirty days to the clerk of this court by certified check made payable to the Treasurer of the United States. This fine is imposed both as a deterrent and to compensate the government, at least in part, for the inordinate expenditure of time required. *See Westinghouse Elec. Corp. v. NLRB*, 809 F.2d 419, 425 (7th Cir. 1987) (counsel fined $1,000 for filing excessively lengthy brief and "correcting" the error by changing the format; this action required the panel to read two sets of briefs); *Farguson v. MBank Houston, N.A.*, 808 F.2d 358, 360 (5th Cir. 1986) ($500 sanction payable to clerk imposed *sua sponte*); *Van Sickle v. Holloway*, 791 F.2d 1431, 1437 (10th Cir. 1986) (fine of $1,500 imposed as sanction "to regulate the docket, promote judicial efficiency, and most importantly in this case, to deter frivolous filings"). This fine is not to be paid by—or passed on to—the appellant. It is imposed on counsel alone.

Conclusion

Accordingly, the judgment of the district court is affirmed. The appellee may recover the usual costs. Sanctions against the appellant's attorney are imposed.

AFFIRMED WITH SANCTIONS

CUDAHY, *Circuit Judge*, concurring:

This is a troubling case, first, because of the plaintiff's garbled argument, which the majority describes, and second, because the defendants rely primarily on the availability of state appellate procedures to satisfy the requirements of due process. The district court accorded some weight to the defendants' position on this latter point. As the majority holds, *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), and numerous other authoritative cases require that for a public employee to be deprived of his property interest in his job, notice and a *pre*-deprivation hearing are required. State post-deprivation remedies do not suffice, and their availability is irrelevant here.

There may indeed be substantial reasons to remand the case to explore Smith's apparent claim of denial of notice and an opportunity for a hearing, but I find it difficult to disagree that Smith has failed adequately to explain the alleged absence of notice and of an opportunity for a hearing, which are presumably the gist of his complaint. Smith loses because of these deficiencies in the presentation of his case on appeal, not because state appellate remedies were available.

FLAUM, *Circuit Judge*, concurring.

I concur in the well-reasoned judgment of the Court on the merits of the case. While the majority opinion accurately reflects the inadequacies of the appellant's brief and the attendant frustrations involved in addressing such a work product, I would forego the public admonition and imposition of a pecuniary sanction in this case. Respectfully, if not regretfully, I have concluded that the papers and argument presented to this Court may well be the product of a current lack of capacity for the appellate craft rather than a formulated indifference to the standards required of counsel in this Court. I would simply urge that counsel seriously ponder further personal preparation and possibly the obtaining of outside professional assistance before attempting to sail again on the Seventh Circuit seas.

Furthermore, since this particular unsatisfactory performance is somewhat unique and not representative of the general level of legal competence displayed before this Court, a non-published admonishment, in my view, would have sufficed.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BRIAN L. SMITH, Plaintiff	)	
vs.	)	CAUSE NO. IP88-531C
TOWN OF EATON, INDIANA TOWN BOARD OF EATON, INDIANA, AND ITS MEMBERS; RONALD HAGGARD AS BOARD MEMBER AND INDIVIDUALLY; DAVID WILLIAMS AS BOARD MEMBER AND INDIVIDUALLY; CHARLES HICKS AS BOARD MEMBER AND INDIVIDUALLY; DON MITCHELL AS BOARD MEMBER AND INDIVIDUALLY; JIMMY VANCE AS TOWN MARSHALL AND INDIVIDUALLY; AND DOES 1 THROUGH 5, Defendants	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court, having heard oral argument by the parties and having

considered the motion for summary judgment and supporting and opposing briefs now enters the following findings of fact and conclusions of law:

Findings of Fact

1. That the defendant, Town of Eaton, Indiana, is a governmental unit organized under the constitution of the state of Indiana.

2. That at all times relevant to this action, the plaintiff, Brian L. Smith, was a full-time member of the Town of Eaton Police Department.

3. That sometime in December of 1987 the plaintiff received notification by the Town Marshal of Eaton of a ten (10) day suspension hearing to be held

on December 29, 1987. Said hearing was conducted by the Town Board of Eaton, whereby the plaintiff was suspended for conduct unbecoming an officer for the ten (10) day period January 15, 1988, to January 29, 1988, pursuant to Ind. Code § 36-8-3-4(b) and (c).

4. That on or about December 18, 1987, the Town Marshal of Eaton notified the plaintiff that additional disciplinary action for conduct unbecoming an officer had been taken resulting in a forfeiture of all days off during the months of January and February, 1988.

5. The plaintiff was, following a hearing on February 24, 1988, again suspended by the Town Marshal of Eaton for conduct unbecoming an officer for

ten (10) days. The suspension, approved retroactively by the Town Board of Eaton, was effective for the period February 19, 1988, to March 4, 1988, pursuant to Ind. Code § 34-8-3-4(b) and (c).

6. Each of the above referenced suspensions were for periods not in excess of ten (10) days. No statutory, practicable right or entitlement to certain days off work was established.

7. On May 5, 1988, in a special session of the Town Board of Eaton, the plaintiff was dismissed from his duties as a full-time police officer for the Town of Eaton for conduct unbecoming an officer, pursuant to Ind. Code § 34-8-3-4. 8. The following day, May 6, 1988, plaintiff filed this

42 U.S.C. § 1983 action.

9. On or about May 14, 1988, after the plaintiff had filed his section 1983 action in this court, the plaintiff, by certified mail, demanded a hearing before the Town Board of Eaton to review the decision to dismiss him.

10. The plaintiff did not appeal his dismissal within thirty (30) days to the circuit or superior court of the county in which the governmental unit is located, as required by Ind. Code § 36-8-3-4(e).

11. During the hearing on the defendant's motion for summary judgment held on June 21, 1989, counsel for plaintiff stipulated that the plaintiff is asserting no pendant state tort

claims against the defendants.

12. The plaintiff's counsel further stipulated, and the court so finds, that no claims are asserted by the plaintiff attacking the appeals process, as provided in Ind. Code § 36-8-3-4, as procedurally inadequate.

13. Any conclusion of law stated below, to the extent that it constitutes a finding of fact is hereby incorporated by reference as an additional finding of fact by the court.

Conclusions of Law

1. Any finding of fact stated above, to the extent that it constitutes a conclusion of law is hereby incorporated by reference as an

additional conclusion of law by the court. 2. Pursuant to Ind. Code § 36-8-3-4(e), a full-time member of a police or fire department in the state of Indiana may only appeal a suspension exceeding ten (10) days in length.

3. The plaintiff has no constitutionally practicable property interest for a suspension for a period of ten (10) days or less.

4. A full-time member of a police or fire department in the state of Indiana may appeal a suspension for a period exceeding ten (10) days, a demotion or a dismissal, by filing an appeal in the superior or circuit court where the governmental unit is located, within thirty (30) days after the

suspension, demotion or dismissal has been rendered. Ind. Code § 36-8-3-4(e) and (f).

5. A suspension for a period exceeding ten (10) days, demotion or dismissal is final and conclusive upon all persons not appealing the decision within thirty (30) days as found in Ind. Code § 36-8-3-4 (f) and (g).

6. Due process requirements are satisfied if a state provides a suspended, demoted, or dismissed full-time member of a police or fire department a constitutionally sufficient appellate procedure, even if that member of a police or fire department merely declines or fails to take advantage of the appeal process available. Dusanek v. Hannon, 677 F.2d 538 (7th Cir. 1982)

7. A full-time member of a police or fire department is not required to exhaust his administrative remedies before filing a 42 U.S.C. § 1983 action in federal court, but a state cannot be held to have violated procedural due process requirements when it has made adequate procedural protections available and the plaintiff has simply refused to avail himself of them. Dusanek, 677 F.2d at 538; Parratt v. Taylor, 451 United States 527 (1981).

8. The plaintiff, having filed his complaint herein one day after his termination, failed to state any claim upon which this court can grant any relief.

9. The plaintiff, having stipulated that he asserts no pendant state tort claims in the complaint,

relieves the court from having to determine whether the plaintiff filed a timely and proper notice of tort claim with the Town of Eaton, as required by Ind. Code § 34-4-16-5-7.

10. There being no material facts in controversy, summary judgment may be ENTERED in defendant's favor.

It is so ORDERED this 21st day of July, 1989.

Sarah Evans Barker, Judge
United States District Court
Southern District of Indiana

Copies to:

Thomas D. Margolis, Esquire

409 West Washington St.

Muncie, Indiana 47305

David S. Wallace, Esquire

Todd Irwin Glass, Esquire

WARNER, WALLACE, McLAREN & DAGUE

400 East Jackson St.

Muncie, Indiana 47305

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BRIAN L. SMITH,	)	
	)	
Plaintiff	)	
	)	
vs.	)	CAUSE NO. IP88-531C
	)	
TOWN OF EATON, INDIANA TOWN BOARD OF EATON, INDIANA, AND ITS MEMBERS; RONALD HAGGARD AS BOARD MEMBER AND INDIVIDUALLY; DAVID WILLIAMS AS BOARD MEMBER AND INDIVIDUALLY; CHARLES HICKS AS BOARD MEMBER AND INDIVIDUALLY; DON MITCHELL AS BOARD MEMBER AND INDIVIDUALLY; JIMMY VANCE AS TOWN MARSHALL AND INDIVIDUALLY; AND DOES 1 THROUGH 5,	)	
	)	
Defendants	)	

JUDGMENT

This cause having come before the court on defendant's motion for summary judgment and the court having held a hearing on said motion on June 21, 1989,

and having considered the oral and written arguments of counsel, the pleadings, and the memoranda submitted by the parties, and the court having found no genuine issue as to any material fact, and that the defendants are entitled to a judgment as a matter of law, it is

ORDERED, ADJUDGED, AND DECREED that judgment is entered in favor of the defendants and against the plaintiff, and the motion for summary judgment is hereby GRANTED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BRIAN L. SMITH, Plaintiff vs. TOWN OF EATON, INDIANA TOWN BOARD OF EATON, INDIANA, AND ITS MEMBERS; RONALD HAGGARD AS BOARD MEMBER AND INDIVIDUALLY; DAVID WILLIAMS AS BOARD MEMBER AND INDIVIDUALLY; CHARLES HICKS AS BOARD MEMBER AND INDIVIDUALLY; DON MITCHELL AS BOARD MEMBER AND INDIVIDUALLY; JIMMY VANCE AS TOWN MARSHALL AND INDIVIDUALLY; AND DOES 1 THROUGH 5, Defendants	)	CAUSE NO. IP88-531C

NOTICE OF APPEAL

Comes now the plaintiff, Brian L. Smith, and submits the Notice of Appeal in the above entitled matter. The judgment of June 21, 1989, to the

Seventh Circuit

Thomas D. Margolis

Thomas D. Margolis

Attorney at Law

409 West Washington

Muncie, In 47305

317/ 288-0600

Certificate of service

I hereby certify the foregoing has been served upon the counsel for the defendants, David S. Wallace, 400 E. Jackson Street, Muncie, Indiana on the day of July,1989, by U.S. mail.

Thomas D. Margolis

Thomas D. Margolis

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

October 17, 1990.

Before

Hon. Richard D. Cudahy, Circuit Judge
Hon. Joel M. Flaum, Circuit Judge
Hon. Kenneth F. Ripple, Circuit Judge

BRIAN L. SMITH, Plaintiff	)	Appeal from the United States District Court, Southern District of Indiana, Indianapolis Division
NO. IP88-531C vs.	)	
TOWN OF EATON, INDIANA TOWN BOARD OF EATON, INDIANA, AND ITS MEMBERS; RONALD HAGGARD AS BOARD MEMBER AND INDIVIDUALLY; DAVID WILLIAMS AS BOARD MEMBER AND INDIVIDUALLY; CHARLES HICKS AS BOARD MEMBER AND INDIVIDUALLY; DON MITCHELL AS BOARD MEMBER AND INDIVIDUALLY; JIMMY VANCE AS TOWN MARSHALL AND INDIVIDUALLY; AND DOES 1 THROUGH 5, Defendants	)	No. 88 C 531 Sarah E. Barker, Judge.

Order

On consideration of the motion for clarification and petition for rehearing in the above-entitled cause filed by the plaintiff-appellant on September 4, 1990, all of the judges on the original panel have voted to deny the motion and the petition for a rehearing. Accordingly,

IT IS ORDERED that the aforesaid motion for clarification and petition for rehearing be, and the same is hereby, DENIED.

THE MUNCIE STAR, THURSDAY, MAY 5, 1988

TOWN BOARD TO MEET

EATON - The Eaton Town Board will meet at 8 a.m. today in an emergency executive session to discuss employee relations.

The Eaton town clerk said a special session which will be open to the public would follow at 8:30 a.m. in the town hall.

THE MUNCIE STAR, THURSDAY, APRIL 28, 1988

TOWN BOARD MEETING

EATON - The town board will meet at 6 p.m. May 4 in town hall - 600 E. Harris St.

EATON POLICE DEPT.
600 E. Harris St.
Eaton, Indiana 47338
Telephone 396-3297

December 18, 1987

Sub. Brian Smith Deputy Marshall Eaton Police Dept.
For Conduct Unbecoming An Officer.

After meetings and phone calls between myself and the police commissioner and several board members it was decided that Brian would forfeit all his days off for the months of Jan. and Feb. 1988 without any extra compensation.

Jimmy Vance
Town Marshall
Eaton Police Dept.

EATON POLICE DEPT.
110 North Hartford St.
Eaton, Indiana 47338
Telephone 396-3297

Sub. Brian Smith

Effective Fri. Feb. 19, 1988 for insubordination, disregarding a direct order from his superiors Brian Smith will be suspended from the Eaton Police Dept. for 10 working days without pay. This suspension ends Mar. 4, 1988. He is also relieved of all police powers for this time. While on suspension he will turn in his 2 deputy Marshal badges, his ID., his portable radio and charger, his keys to the police cars and office. This suspension was handed down by the Town Board at a special meeting held Sat. Feb. 13, 1988. He also no

operate the police radio in his personal car.

Aut. Town Marshal

Jimmie Vance

Auth. Police Comm.

David Williams

EMERGENCY SPECIAL SESSION May 5, 1988

The Town Board of Trustees of the Town of Eaton met in Emergency Special Session with John Penrod, Andy Cavanaugh and David Williams present. Jimmie Vance and Brian Smith were also in attendance.

John Penrod, President, called the meeting to order.

A situation that occurred the weekend of May 1 between Deputy Marshall Brian Smith and Phyllis Canter, owner of Lincoln Crest Apartments was discussed. John Penrod Suggested the Board wait until the Town attorney could be consulted concerning the situation and the Boards position on voting.

David moved Brian Smith be dismissed from the Eaton Police Department effective today, May 5, 1988. Andy seconded. Andy and David voted yes. John abstained. Smith was told by David Williams, Town Board member over the Police Dept. to turn in his things to Marshall Vance.

There being no further business to be brought before the Board, Andy moved and David seconded a motion to adjourn. Motion carried.

John R. Penrod,
President

Lois A. Haggard, Clerk-treasurer

State of Indiana)
)
County of Delaware)

Affidavit of Donald L. Withers

Comes now Donald L. Wither, being first duly sworn in the premises, says as follows:

1. That on Wednesday, February 10, 1988, I was at the Eaton Police Department, Eaton, Indiana.

2. That I am personally familiar with David Williams, the Police commissioner of Eaton, and was so on or about February 10, 1988.

3. That I spoke to David Williams on February 10, 1988.

4. That on that day, David Williams, spoke to me about a position on the Eaton Police Department.

5. That David Williams asked me if I would be interested in a full-time position on the Eaton Police Department on that day.

6. That David Williams was asked by me who was leaving the Eaton Police Department.

7. That David Williams stated that we're going to get rid of Brian Smith.

8. That David Williams, a few minutes earlier, had consulted in person with Andy Cavenaugh and Town Marshall Jimmie Vance in Marshall Vance's office at the Eaton Town Hall, Eaton, Indiana.

9. That David Williams instructed me to get an application for the Eaton Police Department, and that any problems with me living outside of the Town of Eaton would be dealt with.

10. That Marshall Jimmie Vance personally brought me in an application

for the Eaton Police Department on February 15, 1988 at 3309 N. New York Ave. Muncie,In..

affiant further sayeth not.

Donald L. Withers

Subscribed and swirn to before me the undersigned Notary Public on the day of November, 1989.

My Commission Expires: 12-26-92

Catherine Cooper,

Notary Public, resident of Delaware County, Indiana.

(2)

No. 90-1348

Supreme Court, U.S.
FILED
MAR 22 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

BRIAN L. SMITH,

Petitioner,

vs.

TOWN OF EATON, INDIANA, Town Board of Eaton and its Members, Ronald Haggard, as board member and individually, Gale Pitman, as board member and individually, David Williams, as board member and individually, Andy Cavanaugh, as board member and individually, Charles Hicks, as board member and individually, Don Mitchell, as board member and individually, Jimmie Vance, as Town Marshall and individually, and Does 1 thru 5,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION OF RESPONDENTS TOWN OF EATON, ET AL.

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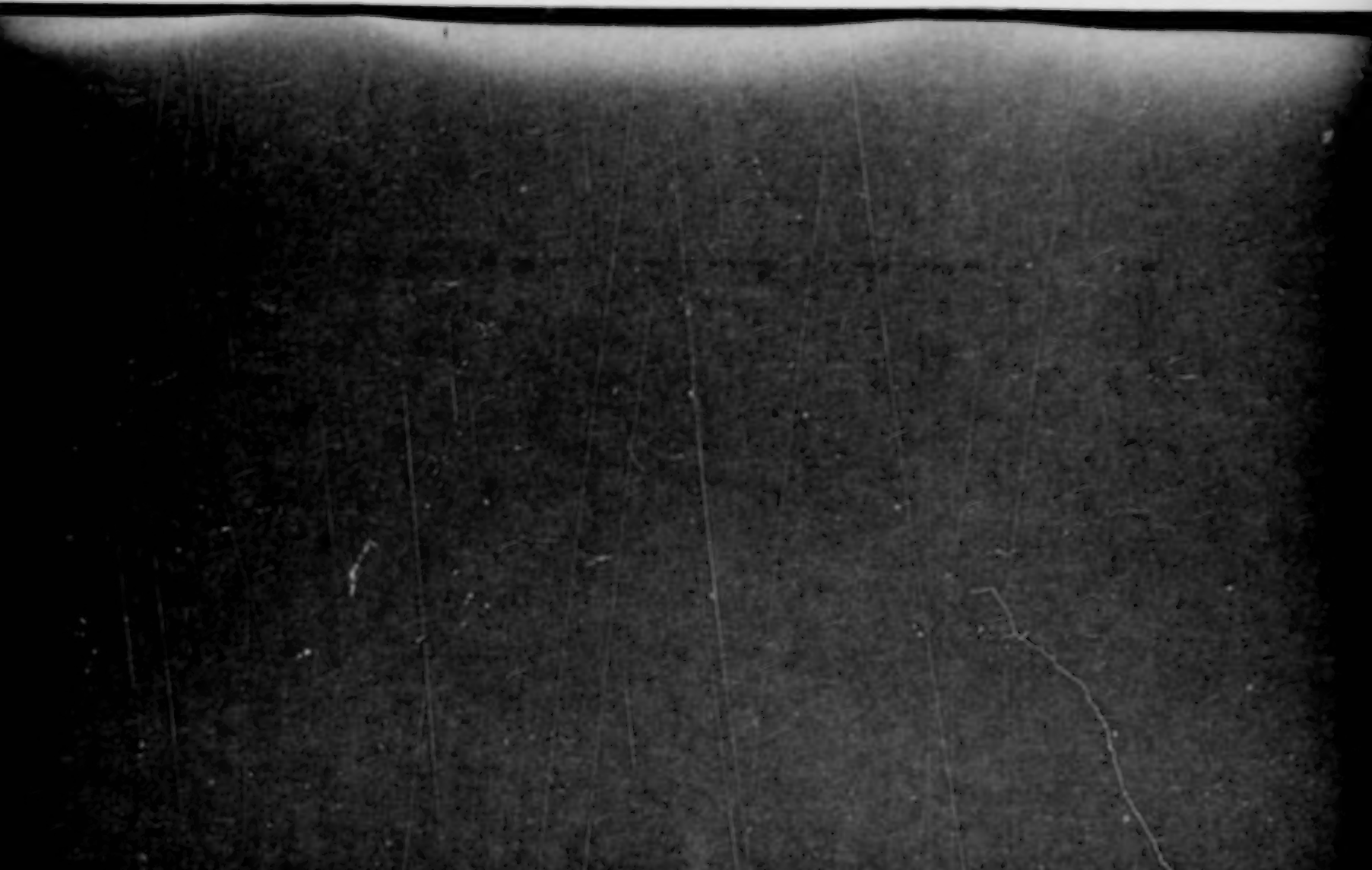

QUESTION PRESENTED FOR REVIEW

I. Did the United States Court of Appeals for the Seventh Circuit properly affirm the District Court's grant of summary judgment, when the Court found the petitioner's allegations of the denial of his constitutional rights were meritless and bordered on the frivolous?

PARTIES

The respondents object to the petitioner's List of Parties to the extent it is incomplete. All parties to this action should be found on the caption as listed on the petitioner's original complaint filed in the United States District Court for the Southern District of Indiana, Indianapolis Division. The petitioner's caption as found in his petition is in error in that it excludes "Gale Pitman, as board member and individually."

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No. 90-1348

In The

Supreme Court of the United States

October Term, 1990

BRIAN L. SMITH,

Petitioner,

vs.

TOWN OF EATON, INDIANA, Town Board of Eaton and its Members, Ronald Haggard, as board member and individually, Gale Pitman, as board member and individually, David Williams, as board member and individually, Andy Cavanaugh, as board member and individually, Charles Hicks, as board member and individually, Don Mitchell, as board member and individually, Jimmie Vance, as Town Marshall and individually, and Does 1 thru 5,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION OF RESPONDENTS TOWN OF EATON, ET AL.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 910 F.2d 1469 (1990),

and is printed in the Appendix hereto, *infra*, pages A-1 through A-10. The judgment, findings of fact and conclusions of law of the United States District Court for the Southern District of Indiana, Indianapolis Division, Judge Sarah Evans Barker presiding, is reproduced in the Appendix attached to the Petition for Writ of Certiorari.

JURISDICTION

The petitioner correctly states the jurisdiction of this petition for review is found at 28 U.S.C. § 1254(1) as to a petition by a party to a civil case after rendition of judgment or decree in the Court of Appeals. However, the petitioner did not state the provisions of Supreme Court Rule 10.1 upon which he relies in his petition, and respondents respectfully submit this petition falls within none of the reasons innumerated in R. 10.1.

STATUTES INVOLVED

The original action filed by the petitioner in the United States District Court was one pursuant to 42 U.S.C. § 1983, in addition to general allegations of violations of his procedural and substantive due process and equal protection rights as found in the Fourteenth Amendment to the United States Constitution.

The petitioner inaccurately provides the Court in his Petition an incomplete text of the statute the petitioner claims to be violative of the United States Constitution, leaving out pertinent portions of the statute relied upon

by the parties below. The petitioner also has not provided proof of service upon the State of Indiana Office of the Attorney General, pursuant to Supreme Court R. 29.4(c). The statute involved, I.C. § 36-8-3-4, is reprinted in its entirety in the Appendix hereto, *infra*, at pages A-11 to A-16.

STATEMENT OF THE CASE

The petitioner's Statement of the Case is replete with inaccuracies and misstatements of the record below and the history of this action. Therefore, the respondents are compelled to submit an accurate version of the history of the case herein.

This action was originally filed by the petitioner on May 6, 1988, in the United States District Court for the Southern District of Indiana, Indianapolis Division, pursuant to 42 U.S.C. § 1983. The complaint was actually filed one day after the petitioner had been dismissed as a police officer by the Town Board of the Town of Eaton, Indiana. The petitioner's dismissal was a culmination of several disciplinary actions beginning in December of 1987.

Early in December of 1987, Brian Smith was notified by the Town Marshall of the Town of Eaton of a hearing to be held on December 29, 1987, regarding a ten (10) day suspension as a result of Smith's altercation with a fellow police officer. After the hearing at which Brian Smith was present, the Town Board approved a suspension of Smith for ten (10) days between January 15, 1988, and January 29, 1988, pursuant to I.C. § 36-8-3-4 (b) and (c).

On December 18, 1987, the petitioner was again notified by the Town Marshall of additional disciplinary action, unrelated to the prior incident, for conduct unbecoming an officer. The action taken against the petitioner was a forfeiture of certain days off. Neither the Court of Appeals nor the petitioner confronted this issue of forfeiture below as a denial of the petitioner's due process rights under the Constitution. Instead, the petitioner concentrated on the two suspensions and his dismissal in his due process arguments. Smith's petition before this Court does not explain how his forfeiture of days off implicated a protected property interest. Furthermore, the petitioner failed to establish such a right at the District Court level, as evidenced by the Court's order found in the petitioner's appendix, at finding Number Six.

On February 24, 1988, the Town Board of Eaton, Indiana, conducted another hearing to investigate further complaints against Brian Smith's conduct as a police officer. The suspension was effective for the period of February 19, 1988, through March 4, 1988, pursuant to I.C. § 36-8-3-4 (b) and (c). The petitioner received notice of this hearing, but apparently chose not to attend. *Smith v. Town of Eaton*, 910 F.2d 1469, 1472 (7th Cir. 1990); Appellant's Brief below, p. 7.

In a general session of the Town Board of Eaton, Indiana, held on May 4, 1988, it was decided an Emergency Session was necessary in order to discuss additional complaints against Brian Smith filed by local citizens. The petitioner was notified, notice was published in the local newspaper, and the Emergency Session was conducted on May 5, 1988. Not only was Brian Smith

present at said meeting, but he was also represented by counsel, Mr. Thomas Margolis. At that meeting, the complaints against Brian Smith were discussed and the Board voted to dismiss the petitioner from his duties for conduct unbecoming an officer pursuant to I.C. § 36-8-3-4. The very next day, the petitioner and his attorney filed a complaint in the United States District Court in Indianapolis, containing fifty (50) rhetorical paragraphs and seeking $7,000,000.00 in compensatory and punitive damages.

The Town of Eaton filed for summary judgment in the United States District Court, and a hearing was held on June 21, 1989. In that hearing, *counsel for petitioner stipulated and agreed he was not contending the appeals process provided for in I.C. § 36-8-3-4 was constitutionally inadequate.* (Appendix to Petition for Writ, at p. A-15). Instead, the petitioner admitted on several occasions to the Court, Judge Sarah Evans Barker presiding, his *complaint was based upon the alleged failure of the Town Board of Eaton, Indiana, to follow the prescribed statutory procedures.* As a result, the District Court found the petitioner's complaint failed to state claims for violations of his due process or equal protection rights. Furthermore, the Court added the State of Indiana had properly safe-guarded Brian Smith's constitutional rights by codifying constitutionally adequate requirements for notice, opportunity to be heard, and post-deprivation remedies.

The petitioner appealed the grant of summary judgment to the United States Court of Appeals, Seventh Circuit, and oral argument was presented on June 11, 1990. In affirming the District Court's grant of summary judgment, the Seventh Circuit found the petitioner's

alleged violation of procedural due process was the only allegation warranting some attention. The Court found the petitioner had been provided *adequate* notice and opportunity to be heard prior to each suspension and his dismissal from the police force. The Court of Appeals also affirmed the District Court's finding Brian Smith either admitted the adequacy of notice and an opportunity to be heard as found in the record, or presented no competent evidence to the contrary. Furthermore, the Court found Brian Smith was either present at the Town Board meetings in question and participated in the discussions, or had received adequate notice of those meetings. The petitioner's allegations of substantive due process and equal protection violations were deemed by the Seventh Circuit to "border on the frivolous" and were dismissed quickly. The Court thereupon admonished the petitioner's attorney for wasting the Court's valuable time and sanctioned the attorney $500.00. The petitioner has now petitioned this Court for a writ of certiorari from the judgment of the Seventh Circuit Court of Appeals.

REASONS FOR DENYING THE WRIT

The petitioner presents a loosely supported and rambling argument that does not support any reason for the issuance of a Writ. His three questions presented for review in his Petition are actually excessively worded allegations the Seventh Circuit misapplied the facts to the law, and that is simply not the case. In support of the Writ, the petitioner repeats the numerous facts that were presented to both the District Court and the Seventh Circuit, and both Courts found those facts to warrant

outright summary judgment. The petition is different from the proceedings below in that some of the arguments are being presented for the first time, and therefore should be deemed waived by the petitioner. In fact, his claim of the unconstitutionality of the applicable state statute is moot for both his failure to make this allegation in the Courts below, and his stipulation at the District Court level that the statute was constitutional. The finding of the Seventh Circuit was entirely substantiated by the record below, and the petitioner presents no basis to find the decision was clearly erroneous or such a departure from the accepted norms of judicial proceedings as to warrant the Writ.

A. The Seventh Circuit Properly Found the Petitioner Received Adequate Notice and an Opportunity to be Heard Prior to His Suspensions and Eventual Dismissal From the Police Force.

A detailed and exhaustive examination of the petitioner's claims of procedural due process violations was conducted by both the District Court and the Seventh Circuit in their attempts to uncover the arguments hidden by the petitioner's poorly presented briefs and oral arguments. Both courts also examined the application of those facts to constitutional standards, and both courts concluded summary judgment was necessary. The same examination of facts and law as conducted by the lower Courts will now be summarized herein.

The examination into the existence of a property interest initially looks to an independent source such as state law, legislation, rules or contracts. State sources, however, do not in and of themselves decide whether a

property interest has been created. *Olim v. Wakinekona*, 461 U.S. 238, 103 S.Ct. 1748, 75 L.Ed.2d 813 (1983); *Hewitt v. Helms*, 459 U.S. 460, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983). Federal constitutional law determines whether such an interest rises to the level of a "legitimate claim of entitlement" protected by the due process clause. *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1976); *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976); *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); *Brown v. Georgia Department of Revenue*, 881 F.2d 1018 (11th Cir. 1989). Upon examination of I.C. § 36-8-3-4, which requires cause to be shown before a tenured police or fire fighter can be dismissed, the Seventh Circuit stated below "we see no reason to question that Mr. Smith had a property interest in his employment." *Smith v. Town of Eaton, et al.*, 910 F.2d 1469, 1471 (7th Cir. 1990). The respondents certainly agree with the learned Court's decision that a property interest existed.

Therefore, Smith could not be deprived of his job without due process of law, which this Court has found on numerous occassions to require in the least a "pretermination opportunity to respond, coupled with post-termination administrative procedures." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); *Fraternal Order of Police Lodge No. 5 v. Tucker*, 868 F.2d 74 (3rd Cir. 1989); *see also Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). The pretermination opportunity to respond incorporates the requirements of oral or written notice, an explanation of the employer's charges against the employee, and an opportunity to be heard or to present the employee's side

of the story. *Davis v. Scherer*, 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984), *rehearing denied* 468 U.S. 1226; *Cleveland Board of Education v. Loudermill*, 470 U.S. at 546, 105 S.Ct. at 1495; *Fraternal Order of Police Lodge No. 5 v. Tucker*, 868 F.2d at 79; *Brasslett v. Cota*, 761 F.2d 827 (1st Cir. 1985). Of particular importance to the case at hand is the Supreme Court's recognition that the pretermination hearing need not be elaborate and can be informal, while providing less than a full evidentiary hearing. *Loudermill*, 470 U.S. at 544, 545, 105 S.Ct. at 1494, 1495; *Smith v. Town of Eaton*, 910 F.2d at 1472; *Tucker*, 868 F.2d at 79.

The Court in *Loudermill* went on to explain why the pretermination hearing need not be elaborate. A full evidentiary hearing is not required in certain circumstances where there are protections against possible mistaken decisions in the pretermination hearing, and post-termination review procedures are in place and available to the employee.[1] "When a discharged employee may receive a post-termination hearing to review adverse personnel action, the pretermiantion hearing need only be extensive enough to guard against mistaken decisions." *Loudermill*, 470 US at 545, 105 S.Ct. at 1495. In such a situation, it is adequate if the pretermination hearing affords the employee a chance to make "plausible arguments that might . . . prevent [the] discharge." *Id.* at 544, 105 S.Ct. at 1494; *see also, Tucker*, 868 F.2d at 79. This is the reasoning

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[1] The only case in which a full pretermination evidentiary hearing was required can be found in *Goldberg v. Kelly*, 397 U.S. 254, 25 L.Ed.2d 287, 90 S.Ct. 1011 (1970), which involved the termination of welfare benefits. See also *Brasslett v. Cota*, 761 F.2d 827, 836 (1st Cir. 1985), at footnote 8.

relied upon by the respondents below and ruled upon by the courts. The writer of the petitioner's brief in support of a writ, who was not associated with this litigation until recently, makes the blind accusations the respondents "offered no evidence of oral or written notice" as to certain hearings, (Petition, p. 11), and that respondents argued pretermination notice and opportunity to be heard was "irrelevant," (Petition, p. 12). The petition before the Court is obviously written by one unaware of the arguments presented below, and the treatment afforded to due process claims by this Court and the Seventh Circuit.

The petitioner's arguments in favor of the issuance of a Writ are simply a rehashing of facts picked selectively from the record below. Brian Smith and his counsel are repeating the same arguments heard in the Courts below to convince the Court to accept their view, and reject the findings of the Courts below, that the notice and opportunity to be heard afforded to this petitioner was somehow insufficient. In the petition, it is claimed no notice was given except prior to the first hearing on December 29, 1987, and that at no time was Smith afforded a meaningful opportunity to respond to the charges against him at any of the hearings. (Petition for Writ, p. 11). These are the same conclusory assertions the petitioner made in the Courts below. The petitioner goes on to conclude the Seventh Circuit's ruling on notice was a "clearly erroneous, unsupported finding." (Petition, pp. 16, 17).

The Seventh Circuit examined the record in detail and found the District Court's ruling that both notice and an opportunity to be heard had been adequately provided to the petitioner was not clearly erroneous. Firstly,

a formal, written notice was received by the petitioner prior to the December 29, 1987, hearing. He not only received the notice, but he attended the hearing, (Petition, p. 19), and participated in that meeting. See *Smith v. Town of Eaton*, 910 F.2d at 1472, footnote 5. Both the District Court and the Seventh Circuit found this to be true, and the petitioner "presented no argument that would allow us to call this determination clearly erroneous." *Id.*, 910 F.2d at 1472. As for his second suspension of ten (10) days, the Seventh Circuit pointed out the petitioner admitted in his Appellant Brief that Smith had received notice. *Id.* If Smith chose then not to attend the hearing or otherwise dispute the disciplinary action, he can not now claim the state failed to provide him due process of law in not providing a meaningful opportunity to be heard.

Finally, as for his dismissal hearing, the record clearly stated, and both Courts below found accordingly, that Smith received adequate notice prior to the May 5, 1988, hearing at which time he was dismissed from the police force. The Seventh Circuit again found the petitioner did not show any reason to conclude this was an erroneous finding, because the petitioner simply alleged in conclusory fashion he was "not able to defend himself prior to any of the numerous disciplinary actions and ultimately his termination." *Id.*, at footnote 5. Not only did the minutes of the May 5th meeting show Smith was present at the hearing, *but the appellant's brief in the Seventh Circuit provided proof Mr. Smith was both there and even represented by counsel, who also participated in the hearing.*

(Appendix of Appellate Brief, p. 21). (The legal representation was obviously ongoing, due to the fact an extensive, fifty-paragraph complaint alleging seven million dollars in damages was filed in federal district court in Indianapolis, fifty-five miles away, the very next morning.) Without even mentioning the fact the petitioner was represented by legal counsel at his dismissal hearing, both the District Court and the Seventh Circuit concluded the petitioner "received adequate procedure to satisfy constitutional requirements of notice and an opportunity to be heard." *Smith v. Town of Eaton*, 910 F.2d at 1472. The Petition for Writ of Certiorari now before this Court provides no evidence of an obvious and exceptional showing of error in this finding as to warrant this writ.

By further examining what is required by due process in a pretermination hearing it becomes even more clear the ruling of the Seventh Circuit is in accord with the decisions of this Court. As the petitioner claims, the notice and opportunity to be heard must be "meaningful," and *Loudermill* defined meaningful as "sufficient explanation of the employer's evidence to permit a meaningful response." See *Fraternal Order of Police Lodge No. 5 v. Tucker, supra*, 868 F.2d at 80. At no time in the proceedings below, and no where in the Petition for Writ of Certiorari, does the petitioner allege he was unaware of the allegations before him. Prior to each hearing, the petitioner knew the circumstances warranting discipline, whether it was physical force against a fellow officer, unauthorized use of police property, or complaints received from Eaton citizens. Both lower courts found the record to show the petitioner was present at the hearings or received notice of them, aware of the charges against

him, and even at one point, represented by counsel before the Town Board of Eaton. Nonetheless, the petitioner continues to make the blanket charges that he was not notified in a "meaningful" way, and denied a "meaningful" opportunity to defend himself.

In his petition Smith admits other decisions have found notices, less substantial than those he received from the respondents, to be constitutionally adequate. Petition at p. 29; *See Kelly v. Smith*, 764 F.2d 1412 (11th Cir. 1985); *Brasslett v. Cota*, 761 F.2d 827 (1st Cir. 1985); *Panozzo v. Rhoads*, 711 F.Supp. 941, 943 (N.D.Ill 1989). As the court stated in *Panozzo*:

> "courts have affirmed the constitutionality of a pretermination hearing where the employee received notice of the charges against him *at the hearing*. (Citations omitted) . . . If this sort of on-the-spot, instantaneous notice does not offend due process, then surely the advance notice . . . passes constitutional muster." *Panozzo*, 711 F.Supp. at 943.

Therefore, other circuits faced with less substantial notice to an employee have uniformly concluded those notices do not offend due process. The petitioner provides no support for his general allegation his notices, that were received prior to any pretermination hearing and sufficient enough to allow his presence and retention of legal counsel, were somehow constitutionally inadequate even though the federal courts have uniformly found less substantial notice to be sufficient.

As stated above, *Loudermill* explains the pretermination hearing need not be elaborate when the Court can identify current, existing post-deprivation procedures

that will operate to further protect due process rights of the employee. I.C. § 36-8-3-4 provides a simple process whereby disciplinary matters may be appealed to the local county superior court within thirty days of the action. Both the petitioner and his attorney were reminded of this appellate procedure at their disposal at the May 5, 1988, hearing. (Appellant's Brief below, Appendix at p. 21). There is no need to have a full evidentiary pretermination hearing when the employee is guaranteed judicial review prior to the deprivation. This is because the pretermination hearing "should be an initial check against mistaken decisions – essentially a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Loudermill*, 470 U.S. 545-546, 105 S.Ct. at 1495; *D'Acquisito v. Washington*, 750 F.Supp. 342, 348 (N.D.Ill. 1990). Contrary to the petitioner's claim, the respondents have maintained this argument throughout this litigation, and have not argued the pretermination procedures were "irrelevant."

Both the District Court and the Seventh Circuit was cognizant of the requirements of due process and went to extreme measures to fairly and completely apply those requirements to the confusing facts brought before them by the petitioner. The petitioner has failed to show any obvious and exceptional error by the Court of Appeals. See *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665, 107 S.Ct. 2617, 96 L.Ed.2d 572 (1987); *Graver Tank and Manufacturing Co. v. Linde Air Products*, 336 U.S. 271, 275, 93 L.Ed. 672 (1948). The findings of fact of the District Court, as approved by the Court of Appeals, should not be set aside without being shown to be clearly erroneous. See

Rogers v. Lodge, 458 U.S. 613, 73 L.Ed.2d 1012, 102 S.Ct. 3272; Annot., 72 L.Ed.2d 890 (1981). By bringing to this Court the same blanket, conclusory allegations that the Seventh Circuit admonished the petitioner never to repeat, the petitioner has woefully failed to present any legitimate reason whatsoever for this Court to find the Seventh Circuit's findings were erroneous and unsupported by any fact.

B. The Petitioner's Claim the State Statute is Unconstitutional is Waived for His Failure to Allege the Argument Below, and the Petitioner Stipulated its Constitutionality at the District Court Level.

Brian Smith's petition for writ of certiorari includes as one of the questions presented for review, the following:

> Whether a statute which requires no hearing before a tenured police officer with a statutory property and liberty interest in his job is suspended for 10 days violates the due process clause of the United States Constitution.

This alleged issue presented by the petitioner is feckless and warrants little response. The allegation is raised for the first time in the Petition for Writ of Certiorari. At no time before the Seventh Circuit Court of Appeals did the petitioner raise a constitutionality issue of the state statute in question or any other rule. At no time before the District Court did the petitioner raise a constitutionality question. In fact, the District Court went to extreme efforts to guarantee the petitioner did not claim the procedures provided him were unconstitutional, by going so far as to ask him on more than one occasion. The

findings of fact and conclusions of law adopted by the District Court document the stipulations made by the petitioner in the hearing on the respondents' motion for summary judgment. (Appendix to Petition, at p. A-15). The petitioner agreed and stipulated he was *not* alleging the processes provided for in I.C. § 36-8-3-4 were constitutionally inadequate, but that he instead was simply alleging the respondents had not followed those procedures provided for in I.C. § 36-8-3-4.

Again at the Court of Appeals level, the petitioner did not allege any portion of I.C. § 36-8-3-4 as procedurally inadequate under constitutional standards. With no constitutional inadequacies of statutes or rules before the Seventh Circuit, no treatment of this issue will be found in the Court's ruling. The respondents would simply repeat the well known rule issues not presented in the court below may not be presented for the first time on appeal. *Pitts v. Unarco Industries, Inc.*, 712 F.2d 276, 278 (7th Cir. 1983); *Crowden v. Lash*, 687 F.2d 996, 1008 (7th Cir. 1982).

It should be noted the petitioner has failed to notify the Attorney General of the State of Indiana of his allegation an Indiana State statute is unconstitutional, pursuant to Supreme Court Rule 29.4(c), which states:

> In any proceeding in this Court wherein the constitutionality of any statute of a State is drawn into question, and the State or any agency, officer or employee thereof is not a party, the initial pleading, motion, or paper filed in this Court shall recite that 28 U.S.C. Sec. 2403(b) may be applicable and shall be served upon the attorney general of that State . . .

It is also noteworthy the petitioner includes this issue as the second question presented for review, and yet no substantive argument of any merit is presented in his petition. He combines the issue of the statute's alleged inadequacy with his third issue on appeal which is simply a reiteration of the first issue concerning meaningful notice. In his argument on the second issue on appeal, (Petition, pp. 30-36), the petitioner repeats his rambling claims that he was not afforded meaningful notice or an opportunity to be heard, and provides case law which establishes due process rights which the respondents enumerate herein. He concludes the argument on the second issue alleging I.C. § 36-8-3-4 is unconstitutional, by stating "he was not able to defend himself at any of the hearings. The Court of Appeals, by its decision, clearly gave no weight to the obvious implications of the Petitioner's assertions that he was denied a meaningful hearing in each of three instances." (Petition, pp. 35, 36). The respondents submit not only did the petitioner fail to raise any issue of constitutionality of state rules or statutes in the courts below, but he stipulated to their adequacy and has provided no argument in support of the issue whatsoever in the petition now before the Court.

C. The Petitioner's Collection of Factual Allegations is a Repetition of the Conduct He Was Admonished by the Seventh Circuit from Repeating, Entitling the Respondents to Appropriate Relief Pursuant to the Rules of This Court.

The several unsupported and frivolous allegations contained in the petition for writ of certiorari warrant attention to afford the Court a more accurate rendition of

the proceedings below. The most untenable argument presented has been discussed above, that the issue of the constitutionality of I.C. § 36-8-3-4 being raised here for the first time. Similarly, the petitioner includes an affidavit of a "David Withers" in his appendix. (Petition, pp. A-33 to A-35). He includes the conclusions stated in that affidavit in the Statement of Facts. The respondents have not seen this affidavit prior to the filing of this petition, and submit it is worthy of absolutely no consideration by this Court. The "affidavit", roughly reproduced in the petition, is not signed nor dated, and no reference to the affidavit is made to the record of the proceedings below.

The petitioner makes numerous falsehoods within the body of his arguments that necessitate comment. As explained above, the respondents did not fail to offer any evidence or oral or written notice of the hearings on the petitioner's suspensions and dismissal, as alleged in the petition at page eleven. Nor did the respondents argue below that pretermination hearings were "irrelevant." (Petition, p. 12). The respondents certainly understand the premier importance of constitutional pretermination procedures. The decisions of this Court, however, do examine procedures available both prior to and after termination. The lower courts in this matter both found the pretermination procedures afforded to the petitioner to be adequate, therefore making the existence of post-termination judicial review relevant to the question whether due process was denied this petitioner. It obviously was not.

Perhaps the most blatantly misleading representation made by the petitioner is found on pages 13-14 of the petition. Nowhere in the Seventh Circuit's opinion is

there a statement that the "Court of Appeals held that the District Court's findings of fact were insufficient to dispose of the issues presented on appeal." This is an outright false reading of the Seventh Circuit's opinion. The petitioner goes on to claim that because of the District Court's insufficient findings, "[t]he United States Court of Appeals was faced with a 'particularly difficult situation.' " (Petition, p. 14). The reference to the Seventh Circuit's ruling, when read in its entirety, shows the Court was faced with a difficult situation *as a result of the petitioner's argument, not the District Court's rulings:*

> We see no functional difference between a brief containing a mere passing reference to a legal argument and one with a shallow, incoherent 'argument' that spans twenty-five pages, the situation presented here. In both instances, the court is frustrated in performing its function of review and evaluation of the judgment before it. Indeed, when the entire brief exhibits lack of attention, we are confronted with a particularly difficult situation.

Smith v. Town of Eaton, 910 F.2d at 1471.

Throughout the petition, Smith alleges the minutes of the meetings of the Town Board of Eaton fail to mention the details of the notices, including their content and how they were given to Smith. He does not explain why the Board's minutes are required to state these things and how their failure to state these things violates his due process. In fact, his entire argument relative to one hearing, the February 24, 1988 hearing on pages 21 and 22 of the petition, is that the minutes do not state anything about the notice given to Smith. The petitioner at no time denies notice was given, nor that he was aware of the

hearing and the charges against him. He was completely aware of both the hearing and the charges against him. He simply chose not to attend. Now he claims because of this decision he was denied due process.

Another falsehood may be found on page thirteen of the Petition for Writ of Certiorari, where the petitioner alleges the District Court merely rubber-stamped the opponents proposed findings of fact. Although the Court ordered the respondents to submit proposed findings, substantial changes were made by the Court in its final order. Such practice has been found both acceptable and common. *Anderson v. Bessemer City*, 470 U.S. 564, 84 L.Ed.2d 518, 105 S.Ct. 1504 (1985); Annot., 54 L.Ed. 2d 868 (1973).

Finally, the petitioner makes a fleeting allegation the District Court misapplied the decision of *Parrott v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), and that a conflict between circuits exists. (Petition, pp. 26, 29). The petitioner does not explain why he feels the application of *Parrott* was erroneous. The reliance on *Parrott* by the District Court was proper, because *Parrott* does not require the exhaustion of administrative remedies prior to bringing a 42 U.S.C. § 1983 action in federal court. As the court explained in *Fetner v. City of Roanoke*, 813 F.2d 1183 (11th Cir. 1987):

> *Parrott* . . . stands for the proposition that a plaintiff may sue only in state court if he fails to state a procedural due process claim under section 1983. Unlike an exhaustion requirement, which is based upon principles of comity, the

> Parrott analysis is based upon the concept that there is no constitutional violation if a plaintiff has not been deprived of a protected interest without due process of law.

Id., 813 F.2d at 1185, footnote 5. This is the reasoning relied upon by the District Court, which also cited the decision of *Dusanek v. Hannon*, 677 F.2d 538 (7th Cir. 1982). In *Dusanek*, the court found, after noting the administrative procedures provided for both a pretermination hearing and post-termination resort to judicial review, that "the state cannot be held to have violated due process requirements when it has made procedural protection available and the plaintiff has simply refused to avail himself of them." *Id.*, 677 F.2d at 543. Therefore, the respondents submit to the Court the lower court's reliance upon applicable case law was proper, and the petitioner has failed to explain the legal reasoning of his discontent.

Finally, the alleged conflict between circuits is no conflict at all. Again, in a passing reference, the petitioner claims the Eleventh Circuit found in *Fetner* that a thirty minute prior notice of a pretermination hearing was insufficient, while several other circuits have held less than twelve hours' notice to be sufficient. (Petition, p. 29). A closer reading of *Fetner*, however, shows the Court found the violation of due process was the result of the lack of a written notice that presented the reasons for his termination, and the lack of a pretermination hearing. The timing of the notice did not enter into the Court's discussion. Therefore, the respondents are aware of no conflict between the Circuits.

The Petition for Writ of Certiorari represents the third time this petitioner has presumed a right to belabor the courts with the same argument the lower courts have labeled "meritless" and "border[ing] on the frivolous." This petition also represents the petitioner's decision to ignore the Seventh Circuit's admonition that the repetition of meritless arguments wastes the court's time and "that such performance is not to be repeated. Any such repetition may well result in suspension from practice before this court." *Smith v. Town of Eaton*, 910 F.2d at 1473. Due to the lack of any competent evidence to show the ruling below to be erroneous, and the petitioner's continuing refusal to abide by the Court of Appeals admonition not to waste the Court's resources as he has done here, the respondents respectfully submit they are due interest and damages pursuant to Supreme Court Rule 42.2.

CONCLUSION

As both the District Court and the Seventh Circuit found after laborious review of the petitioner's crusade of rambling opinions and distorted facts, there was no denial of due process here. This Petition demonstrates nothing that would tend to show the Seventh Circuit's decision to be clearly erroneous or a departure from the accepted and usual course of judicial proceedings. The process afforded to this petitioner did not deny him his due process, and the state can not be held to have violated the same when the state has provided adequate pre-termination procedures and adequate post-termination

judicial review. For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 89-2563

BRIAN L. SMITH,

Plaintiff-Appellant,

v.

TOWN OF EATON, INDIANA, TOWN BOARD OF EATON AND ITS MEMBERS, RONALD HAGGARD, as board member and individually, GALE PITMAN, as board member and individually, DAVID WILLIAMS, as board member and individually, ANDY CAVANAUGH, as board member and individually, CHARLES HICKS, as board member and individually, DON MITCHELL, as board member and individually, JIMMIE VANCE, as Town Marshall and individually, and DOES 1 thru 5,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Indiana,
Indianapolis Division.
No. 88 C 531 – **Sarah E. Barker,** *Judge.*

ARGUED JUNE 11, 1990 – DECIDED AUGUST 21, 1990

Before CUDAHY, FLAUM, and RIPPLE, *Circuit Judges.*

RIPPLE, *Circuit Judge.* Brian Smith filed a complaint under 42 U.S.C. § 1983 on May 6, 1988, the day following his termination as a police officer for the Town of Eaton. Mr. Smith's complaint asserted that his dismissal violated

his constitutional right to procedural due process, substantive due process, and equal protection. The district court granted the defendants' motion for summary judgment, and Mr. Smith appealed. For the following reasons, we affirm the judgment of the district court.

I

We must begin with an observation fortunately not necessary in too many cases that come before us. The appellant's brief is rambling, almost totally incomprehensible in its treatment of the issues and legal principles. The treatment of the factual background of the case is similarly lacking. It is well established that it is the duty of attorneys preparing cases for this court to examine carefully the law and apply it in a cogent fashion to the facts of the case. Under Rule 28(a)(4) of the Federal Ruies of Appellate Procedure, counsel is required to present a brief that contains "the contentions of the appellant with respect to the issues presented, and the reasons therefor." We have noted that this rule requires counsel to present its arguments in a professional manner. *John v. Barron*, 897 F.2d 1387, 1393-94 (7th Cir. 1990). Unprofessional presentation of arguments not only is a disservice to this court, but also "is a disservice to other litigants," who must wait while this court is forced to undertake the extra duty of formulating counsel's arguments. *Bonds v. Coca-Cola Co.*, 806 F.2d 1324, 1328 (7th Cir. 1986). Especially now, when the court system is burdened to capacity, and when judicial resources are stretched to the very limit, our fiduciary duty to the institution we serve and to *all* the litigants who come before us requires that we be vigilant in

enforcing the bar's responsibility to present issues clearly and comprehensively.[1]

This case presents a somewhat different problem from the cases in which we usually invoke Rule 28. Most of our cases have involved instances where counsel's submission is far too abbreviated and sketchy.[2] In those cases, we have stated repeatedly that this court cannot be called upon to supply the legal research and organization to flesh out a party's arguments. *See John*, 897 F.2d at 1393; *Zelazny v. Lyng*, 853 F.2d 540, 542 n.1 (7th Cir. 1988); *Beard v. Whitley County REMC*, 840 F.2d 405, 408-09 (7th Cir. 1988); *Bonds*, 806 F.2d at 1328; *Sanchez v. Miller*, 792 F.2d 694, 703 (7th Cir. 1986), *cert. denied*, 479 U.S. 1056 (1987). We see no functional difference between a brief containing a mere passing reference to a legal argument and one with a shallow, incoherent "argument" that spans twenty-five pages, the situation presented here. In both instances, the court is frustrated in performing its

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[1] The duty that the bar owes to this court is mirrored by counsel's duty to represent clients competently. As stated by Rule 1.1 of the ABA Model Rules of Professional Conduct: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

[2] *See Bonds v. Coca-Cola Co.*, 806 F.2d 1324, 1328 (7th Cir. 1986) ("collateral allusions to a legal issue do not require the court to decide difficult questions"); *cf. United States v. White*, 879 F.2d 1509, 1513 (7th Cir. 1989) (argument raised in passing in a footnote deemed waived), *cert. denied*, 110 S. Ct. 1471 (1990); *Lachman v. Illinois Stat Bd. of Educ.*, 852 F.2d 290, 291 n.1 (7th Cir.) (issue is waived due to party's failure to present substantive argument), *cert. denied*, 109 S. Ct. 308 (1988).

function of review and evaluation of the judgment before it.

Indeed, when the entire brief exhibits lack of attention, we are confronted with a particularly difficult situation. We recently have made it clear that we shall not hesitate to dismiss an appeal due to poorly prepared and researched briefs. *See John*, 897 F.2d at 1393 ("[W]e warned that one day the penalty for a perfunctory appeal could be dismissal of the appeal. That day has arrived.") (citation omitted); *cf. Spartacus, Inc. v. Borough of McKees Rocks*, 694 F.2d 947, 950 (3rd Cir. 1982) (Garth, J., dissenting) (dismissal of appeal appropriate when party does not present a court with complete brief).[3] This case comes close – very close – to meriting that sanction. However, because we can glean – albeit faintly – the basic facts and the general lines of argument from the briefs and record, we shall deal, as best we can under the circumstances, with what appear to be the basic contentions of the appellant.

II

Brian Smith had been employed as a police officer for the Town of Eaton since 1986. Beginning apparently in late 1987, Mr. Smith engaged in several activities that drew the attention of his supervisors and ultimately

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[3] Other federal appellate courts have recognized that dismissal as a sanction for poorly presenting a case on appeal is a necessary and salutary measure. *See* Annotation, *Sanctions in Federal Circuit Courts of Appeals, for Failure to Comply with Rules Relating to Contents of Briefs and Appendixes*, 55 A.L.R. Fed. 521, 526-27 (1981) (collecting cases).

resulted in two suspensions of ten days each to be carried out in January and February, 1988. On May 5, 1988, the Town Board of Eaton met to investigate additional complaints against Mr. Smith. At that meeting the Board voted to dismiss Mr. Smith for conduct unbecoming a police officer, pursuant to Indiana Code § 36-8-3-4.

III

Mr. Smith alleges three constitutional violations to support his section 1983 claim. First, he argues that he was denied procedural due process. A due process claim (procedural or substantive) must be based on a violation of a protected liberty or property interest. *Bishop v. Wood*, 426 U.S. 341, 343 (1976). On the record before us, we see no reason to question that Mr. Smith had a property interest in his employment that was implicated by the ten day suspensions and his ultimate dismissal.[4] However,

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[4] Indiana Code § 36-8-3-4(b) permits suspension or dismissal of a police officer, but only upon the occurrence of several enumerated reasons. This court has interpreted a predecessor statute of section 36-8-3-4 to provide a property interest. *Parrett v. City of Connersville, Ind.*, 737 F.2d 690, 694 (7th Cir. 1984) (in the context of a dismissal), *cert. dismissed*, 469 U.S. 1145 (1985). An Indiana court came to the opposite conclusion when it interpreted the predecessor statute. *Dunlap v. Cross*, 403 N.E.2d 885, 887-88 (Ind. Ct. App. 1980). It appears that the *Dunlap* court placed great emphasis on the lack of appellate recourse in the statute for a suspension of less than 10 days. But as the Supreme court has made clear, state procedures do not in themselves decide the question of whether a property interest has been created. *Olim v. Wakinekona*, 461 U.S. 238, 250-51 (1983); *Hewitt v. Helms*, 459 U.S. 460, 471 (1983). Because

(Continued on following page)

his claim cannot succeed if the procedures he received were constitutionally adequate. The Supreme Court has established that an employee possessing a property interest in his job must be given notice and an opportunity to be heard prior to discipline. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547 (1985) (dismissal); *see also Garraghty v. Jordan*, 830 F.2d 1295, 1299-1300 (4th Cir. 1987) (applying *Loudermill* to five day suspension); *Pesce v. J. Sterling Morton High School*, 830 F.2d 789, 793 (7th Cir. 1987) (same); *cf. Goss v. Lopez*, 419 U.S. 565, 581 (1975) (requiring notice and opportunity to be heard before student may be suspended). The Supreme Court has made clear that this procedure need not be elaborate and can be satisfied with less than a full evidentiary hearing. *Loudermill*, 470 U.S. at 545.

The district court found that Mr. Smith received notice and a hearing prior to his ten day suspension in January and his dismissal in May. Mr. Smith has presented no argument that would allow us to call this determination clearly erroneous.[5] The district court did

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(Continued from previous page)

we treat Mr. Smith's suspensions, no matter what their length, as constituting the deprivation of a property interest, we need not concern ourselves with counsel's convoluted and at times incomprehensible time computations.

[5] In conclusory fashion, Mr. Smith asserted in his brief to this court that he was "not able to defend himself prior to any of the numerous disciplinary actions and ultimately his termination." Appellant's Br. at 16. The minutes from the town board's May 5 executive session in which Mr. Smith was formally discharged indicate that Mr. Smith was present. R.18 Ex. 4. In addition, Mr. Smith admits in an affidavit that he was

(Continued on following page)

not make a specific finding that Mr. Smith received notice before his ten day suspension in February, but Mr. Smith admits in his brief that he received notice. Appellant's Br. at 7. We conclude, therefore, that Mr. Smith received adequate procedure to satisfy the constitutional requirements of notice and an opportunity to be heard.

Mr. Smith's other two constitutional arguments border on the frivolous and will be discussed only briefly. Mr. Smith asserts that the actions by the Town Board of Eaton violated his substantive due process rights. The board's actions of suspending and ultimately dismissing Mr. Smith are based on several problems related to Mr. Smith's work, including an altercation with another officer, failure to follow procedure, and a written complaint by a citizen regarding Mr. Smith's performance of his duties. R.18 Ex. 4; R.20 Exs. A & D; R.21 at 4. In the face of these incidents, Mr. Smith presents no argument nor alleges any facts that would support a finding that the board's action was arbitrary or capricious. We conclude, therefore, that Mr. Smith's substantive due process claim has no merit.

Mr. Smith's equal protection argument similarly is meritless. He claims that the town board had information

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present at the executive session on December 29, 1987 at which his first 10 days suspension was discussed, R.21 at 5, and the minutes of that meeting indicate that Mr. Smith participated by asking questions. R.21 Ex. 1. While mere presence is not enough to satisfy the requirement that an employee be given an opportunity to be heard prior to an action that infringes a property interest, Mr. Smith never has contended that he was prevented from speaking at the meetings.

regarding complaints against two other officers and did not suspend or dismiss them. Appellant's Br. at 15. An equal protection claim must be based on "intentional discrimination against [the plaintiff] because of his membership in a particular class, not merely [because] he was treated unfairly as an individual." *Huebschen v. Department of Health and Social Servs.*, 716 F.2d 1167, 1171 (7th Cir. 1983); *see also Gray v. Lacke*, 885 F.2d 399, 414 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1476 (1990). Mr. Smith does not allege such class-based discrimination, and therefore this claim also fails.

IV

Having disposed of the substantive issues before us, we now turn to the matter of sanctions. We must conclude that appellant's counsel's performance in this appeal has been substandard. We have been impeded in our review of the case and valuable time has been lost. We first admonish counsel that such performance is not to be repeated. Any such repetition may well result in suspension from practice before this court. Second, we fine counsel five hundred dollars ($500), payable within thirty days to the clerk of this court by certified check made payable to the Treasurer of the United States. This fine is imposed both as a deterrent and to compensate the government, at least in part, for the inordinate expenditure of time required. *See Westinghouse Elec. Corp. v. NLRB*, 809 F.2d 419, 425 (7th Cir. 1987) (counsel fined $1,000 for filing excessively lengthy brief and "correcting" the error by changing the format; this action required the panel to read two sets of briefs); *Farguson v. MBank Houston, N.A.*, 808 F.2d 358, 360 (5th Cir. 1986) ($500 sanction payable to clerk imposed *sua sponte*); *Van*

Sickle v. Holloway, 791 F.2d 1431, 1437 (10th Cir. 1986) (fine of $1,500 imposed as sanction "to regulate the docket, promote judicial efficiency, and most importantly in this case, to deter frivolous filings"). This fine is not to be paid by – or passed on to – the appellant. It is imposed on counsel alone.

Conclusion

Accordingly, the judgment of the district court is affirmed. The appellee may recover the usual costs. Sanctions against the appellant's attorney are imposed.

AFFIRMED WITH SANCTIONS

CUDAHY, *Circuit Judge*, concurring:

This is a troubling case, first, because of the plaintiff's garbled argument, which the majority describes, and second, because the defendants rely primarily on the availability of state appellate procedures to satisfy the requirements of due process. The district court accorded some weight to the defendants' position on this latter point. As the majority holds, *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), and numerous other authoritative cases require that for a public employee to be deprived of his property interest in his job, notice and a *pre*-deprivation hearing are required. State post-deprivation remedies do not suffice, and their availability is irrelevant here.

There may indeed be substantial reasons to remand the case to explore Smith's apparent claim of denial of notice and an opportunity for a hearing, but I find it difficult to disagree that Smith has failed adequately to explain the alleged absence of notice and of an

opportunity for a hearing, which are presumably the gist of his complaint. Smith loses because of these deficiencies in the presentation of his case on appeal, not because state appellate remedies were available.

FLAUM, *Circuit Judge*, concurring.

I concur in the well-reasoned judgment of the Court on the merits of the case. While the majority opinion accurately reflects the inadequacies of the appellant's brief and the attendant frustrations involved in addressing such a work product, I would forego the public admonition and imposition of a pecuniary sanction in this case. Respectfully, if not regretfully, I have concluded that the papers and argument presented to this Court may well be the product of a current lack of capacity for the appellate craft rather than a formulated indifference to the standards required of counsel in this Court. I would simply urge that counsel seriously ponder further personal preparation and possibly the obtaining of outside professional assistance before attempting to sail again on the Seventh Circuit seas.

Furthermore, since this particular unsatisfactory performance is somewhat unique and not representative of the general level of legal competence displayed before this Court, a non-published admonishment, in my view, would have sufficed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

36-8-3-4. **Disciplinary powers of safety boards in cities, towns and townships.** – (a) This section also applies to all towns and townships that have full time, paid police or fire departments. For purposes of this section, the appropriate appointing authority of a town or township is considered the safety board of a town or township. In a town with a board of metropolitan police commissioners, that board is considered the safety board of the town for police department purposes.

(b) Except as provided in subsection (m), a member of the police or fire department holds office or grade until the member is dismissed or demoted by the safety board. A member may be disciplined by demotion, dismissal, reprimand, forfeiture, or suspension upon either:

(1) Conviction in any court of any crime; or

(2) A finding and decision of the safety board that the member has been or is guilty of any one (1) or more of the following:

(A) Neglect of duty.

(B) A violation of rules.

(C) Neglect or disobedience of orders.

(D) Incapacity.

(E) Absence without leave.

(F) Immoral conduct.

(G) Conduct injurious to the public peace or welfare.

(H) Conduct unbecoming an officer

(I) Another breach of discipline.

The safety board may not consider the political affiliation of the member in making a decision under this section.

(c) Before a member of a police or fire department may be suspended in excess of ten (10) days, demoted, or dismissed, the safety board shall offer the member an opportunity for a hearing, if demanded. Written notice shall be given either by service upon the member in person or by a copy left at his last and usual place of residence. The notice must state:

(1) The time and place of the hearing;

(2) The charges against the member;

(3) The specific conduct that comprises the charges;

(4) That the member is entitled to be represented by counsel;

(5) That the member is entitled to call and cross-examine witnesses;

(6) That the member is entitled to require the production of evidence; and

(7) That the member is entitled to have subpoenas issued, served, and executed in the county where the unit is located.

(d) Upon an investigation into the conduct of a member of the police or fire department, or upon the trial of a charge preferred against a member of either department, the safety board may compel the attendance of witnesses, examine them under oath, and require the production of books, papers, and other evidence at a meeting of the board. For this purpose, the board may issue subpoenas and have them served and executed in any part of the county where the unit is located. If a

witness refuses to testify or to produce books or papers in the witness's possession or under the witness's control, IC 36-4-6-21 controls to the extent applicable. The proper court may compel compliance with the order by attachment, commitment, or other punishment.

(e) The reasons for the suspension, demotion, or dismissal of a member of the police or fire department shall be entered as specific findings of fact upon the records of the safety board. A member who is suspended for a period exceeding ten (10) days, demoted, or dismissed may appeal the decision to the circuit or superior court of the county in which the unit is located. However, a member may not appeal any other decision.

(f) An appeal under subsection (e) must be taken by filing in court, within thirty (30) days after the date the decision is rendered, a verifired [sic] complaint stating in concise manner the general nature of the charges against the member, the decision of the safety board, and a demand for the releif [sic] asserted by the member. A bond must also be filed that guarantees the appeal will be prosecuted to a final determination and that the plaintiff will pay all costs adjudged against the plaintiff. The bond must be approved as bonds for costs are approved in other cases. The unit must be named as the sole defendant, and the plaintiff shall have a summons issued as in other cases against the unit. Neither the safety board nor the members of it may be made parties defendant to the complaint, but all are bound by service upon the unit and the judgment rendered by the court.

(g) In an appeal under subsection (e), no pleading is required by the unit to the complaint, but the allegations

are considered denied. The unit may file a motion to dismiss the appeal for failure to perfect it within the time and in the manner required by this section. If more than one (1) person was included in the same charges and in the same decision of dismissal by the safety board, then one (1) or more of the persons may join as plaintiffs in the same complaint, but only the persons that appeal from the decision are affected by it. The decision of the safety board is final and conclusive upon all persons not appealing. The decision appealed from is not stayed or affected pending the final determination of the appeal, but remains in effect unless modified or reversed by the final judgment of the court.

(h) A decision of the safety board is considered prima facie correct, and the burden of proof is on the party appealing. All appeals shall be tried by the court. The appeal shall be heard de novo only upon any new issues related to the charges upon which the decision of the safety board was made. The charges are considered to be denied by the accused person. Within ten (10) days after the service of summons the safety board shall file in court a complete transcript of all papers, entries, and other parts of the record relating to the particular case. Inspection of these documents by the person affected, or by the person's agent, must be permitted by the safety board before the appeal is filed, if requested. Each party may produce evidence relevant to the issues that it desire, and the court shall review the record and decision of the safety board upon appeal.

(i) The court shall make specific findings and state the conclusions of law upon which its decision is made. If the court finds that the decision of the safety board

appealed from should in all things be affirmed, its judgment should state that, and judgment for costs shall be rendered against the party appealing. If the court finds that the decision of the safety board appealed from should not be affirmed in all things, then the court shall make a general finding, setting out sufficient facts to show the nature of the proceeding and the court's decision on it. The court shall either:

(1) Reverse the decision of the safety board; or

(2) Order the decision of the safety board to be modified.

(j) The final judgment of the court may be appealed by either party. Upon the final disposition of the appeal by the courts, the clerk shall certify and file a copy of the final judgment of the court to the safety board, which shall conform its decision and records to the order and jdugment [sic] of the court. If the decision is reversed or modified, then the safety board shall pay to the party entitled to it any salary or wages withheld from the party pending the appeal and to which the party is entitled under the jdugment [sic] of the court.

(k) Either party shall be allowed a change of venue from the court or a change of judge in the same manner as such changes are allowed in civil cases. The Indiana Rules of Trial Procedure govern in all matters of procedure upon the appeal that are not otherwise provided for by this section.

(l) An appeal takes precedence over other pending litigation and shall be tried and determined by the court as soon as practical.

(m) The executive may reduce in grade any member of the police or fire department who holds an upper level policy making position. The reduction in grade may be made without adhering to the requirements of subsections (b) through (l). However, a member may not be reduced in grade to a rank below that which the member held before the member's appointment to the upper level policy making position. [IC 36-8-3-4, as added by Acts 1981, P.L. 309, § 52; 1981, P.L. 315, § 2; P.L. 104-1983, § 5; P.L. 58-1989, § 3.]